

Florida Law Review

Volume 63 | Issue 1

Article 6

2-8-2013

Accountability, Liability and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles

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George D. Brown, *Accountability, Liability and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 Fla. L. Rev. 193 (2011).

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ACCOUNTABILITY, LIABILITY, AND THE WAR ON TERROR— CONSTITUTIONAL TORT SUITS AS TRUTH AND RECONCILIATION VEHICLES

*George D. Brown**

Abstract

This Article examines the role of civil suits in providing accountability for the Bush administration's conduct of the "war on terror." There have been calls for a "Truth and Reconciliation Commission" to perform this function, almost like a retroactive impeachment of President Bush. For now, the idea appears to be dead, especially since many of the policies have continued under President Obama. Increasingly, the default accountability mechanism for questioning government conduct is the array of civil suits against federal officials by self-proclaimed victims of the war, cases which might be referred to as reverse war on terror suits. Many of these suits are high profile, including *Ashcroft v. Iqbal*, *Padilla v. Yoo*, and *Arar v. Ashcroft*.

These suits often fail at the threshold. This Article examines the specific reasons for these failures—including the *Bivens* doctrine, qualified immunity, and the state secrets privilege—and explores their underlying causes. It identifies both a systemic hesitation to use the tort suit as a vehicle for questioning government policy and an enhanced hesitation when the policy involves national security, an area of high judicial deference to the government. In addition to these problems, the Article concludes that the suits, like the commission proposal, suffer from the same retributive motivation and premises. The legal climate that reverse war on terror suits face may become more receptive. Perhaps, however, the goal of accountability should be re-examined and sought through other means.

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It has always been true that a real accounting of the Bush administration’s abuses is vital if Mr. Obama truly wants to repair them and try to prevent them from recurring. It is more important than ever now, when the Republican right is trying hard to turn the clock back to those dark times by painting Democrats as “soft on terror” during an election year.

—*The New York Times* **

I. INTRODUCTION

Long after George W. Bush left office, his administration’s anti-terrorism efforts remain the subject of intense controversy. Supporters, led by former Vice President Dick Cheney, insist that the strong measures of the war on terror were necessary to keep the nation safe.¹ Opponents, led by the *New York Times*, denounce these efforts as unconstitutional violations of civil liberties and an abandonment of fundamental American values.² The division is deep; the debate continues.

** Editorial, *Seven Paragraphs*, N.Y. TIMES, Feb. 15, 2010, at A20.

1. Joseph Williams & Bryan Bender, *Obama and Cheney Clash on the Fight Against Terror*, BOS. GLOBE, May 22, 2009, at A1.

2. Editorial, *One Hundred*, N.Y. TIMES, Apr. 29, 2009, at A22 (“[President Obama] needs to rethink . . . his opposition to a full public inquiry to determine why, how and by whom so many

Some have called for a national inquiry into the war on terror.³ Their general goal is “accountability,” and the South African Truth and Reconciliation Commission is the apparent model.⁴ Fault on the part of the Bush administration is assumed. Prominent among the specific goals of any such commission would be determining what policies were at the center of the war on terror, what governmental actions rose to the level of constitutional violations, and how to prevent such errors from occurring in the future.⁵ To this date, however, no commission has been established. Indeed, the formation of any such body seems increasingly unlikely. There are several reasons why this is so.

First, the war on terror continues. Observers from different ends of the political spectrum have noted, sometimes with chagrin, the degree to which President Barack Obama has kept in place policies and practices of his predecessor.⁶ Another reason is that the widely touted South African model is singularly inappropriate.⁷ America is not emerging from a civil war. We have not changed our form of government. Controversial though it may be, the Bush administration’s war on terror did not leave permanent scars on a large swath of the body politic. Perhaps the major reason why calls for an American Truth and Reconciliation Commission have foundered is a fundamental ambiguity about the role of the body. Is it an inquiry into what policies have been followed to combat terrorism and whether they should be continued in the future (mindful of the need to balance national security with concerns for individual liberties)? Or is it an exposé of what the Bush administration did wrong, assuming guilt and apportioning blame? The former might be called the inquiry model; the latter the retributive model. The emphasis of proponents like Senator Patrick Leahy on retribution⁸ has hobbled the effort from the start. Not surprisingly, the political system has resisted calls for a retroactive impeachment.

The thesis of this Article is that, despite the lack of a formal commission, we already have an accountability mechanism that operates with increasing frequency and prominence: the tort suits brought by self-proclaimed victims of the war on terror against present and former government officials. Grievances have included extraordinary rendition,⁹

orders were given to violate the law and the most cherished Constitutional rights.”).

3. *E.g.*, Nicholas D. Kristof, Op-Ed., *Time to Come Clean*, N.Y. TIMES, Apr. 26, 2009, at WK14.

4. *See* Senator Patrick Leahy, Restoring Trust in the Justice System: The Senate Judiciary Committee’s Agenda in the 111th Congress, Remarks at the Marver H. Bernstein Symposium on Governmental Reform at Georgetown University (Feb. 9, 2009), *available at* <http://www.truth-out.org/021009K> (invoking the South African experience).

5. *Id.*

6. *See, e.g.*, Charlie Savage, *To Critics, New Policy on Terror Looks Like Old*, N.Y. TIMES, July 2, 2009, at A14.

7. *See* Jack M. Balkin, Op-Ed., *A Body of Inquiries*, N.Y. TIMES, Jan. 11, 2009, at WK11.

8. *See* Leahy, *supra* note 4.

9. *See, e.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009).

unauthorized surveillance,¹⁰ conditions of confinement,¹¹ and unauthorized detention.¹² Defendants have ranged from the former Attorney General and the Director of the FBI to corrections officials and prison guards.¹³ Some of the suits in question are high profile, such as the action by “enemy combatant” Jose Padilla against former Bush Justice Department official John Yoo.¹⁴ Beyond compensation, there is also often a broader, political dimension. For example, Padilla sought damages of \$1 in his suit based on injuries to constitutional rights flowing, ultimately, from Yoo’s advice to other government officials.¹⁵

Such actions might be referred to as reverse war on terror suits. Instead of the government bringing a criminal proceeding against a suspected terrorist, former suspects sue officials in civil, usually tort, actions. However, as this Article will develop, reverse war on terror suits face a striking number of obstacles. There is an array of doctrines that seriously constrain their availability. Finding a right of action is an initial constraint, particularly given the limits on constitutional tort suits brought under the doctrine derived from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁶ The *Bivens* doctrine is the principal means of getting reverse war on terror suits into court. Alternative causes of action are difficult to establish.¹⁷ Getting past this stage is only the beginning. Official defendants will enjoy qualified immunity, preventing many suits from being heard.¹⁸ Even if denied, the immunity defense can tie a lawsuit into knots since the denial is subject to appeal under the collateral order doctrine.¹⁹ Attempts to hold high-level officials liable will encounter problems of limits on supervisory liability, especially after the Supreme Court’s decision in *Ashcroft v. Iqbal*.²⁰ Assertions of the state secrets privilege can limit the plaintiff’s suit or block the suit altogether.²¹ It is true that in *Marbury v. Madison*,²² Chief Justice John Marshall declared that

10. See, e.g., *In re Sealed Case*, 494 F.3d 139, 146 (D.C. Cir. 2007).

11. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

12. See, e.g., *Al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

13. See, e.g., *Iqbal*, 129 S. Ct. at 1943.

14. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

15. First Amended Complaint at 21, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 3:08-cv-00035), 2008 WL 2433172.

16. See George D. Brown, “Counter-Counter-Terrorism via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 858–66 (2009) (discussing at length *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1970)).

17. See *infra* Part III.C.1.

18. See Note, *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1163 (2009).

19. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945–47 (2009) (discussing the collateral order doctrine).

20. *Id.* at 1949.

21. See *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007).

22. 5 U.S. (1 Cranch) 137 (1803).

“[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”²³ That right, however, is far from absolute, even in a public law system based on *Marbury*.

This Article considers the question of why such suits are so difficult to bring. One possibility is that the legal system reflects, implicitly, the view that tort suits are an imperfect vehicle for evaluating and formulating public policy, particularly binding constitutional limits. For example, an individual suit may consider only a tiny slice of a broader systemic problem. I do not believe, however, that such objections are a sufficient explanation for the difficulties that reverse war on terror suits encounter. Constitutional adjudication is an integral part of our system, and at the state and local level, policies are affected, even made, through constitutional tort suits brought under § 1983.²⁴ Theories of adjudication emphasize its legitimacy as a means of formulating public values.²⁵ The common law has played an indispensable role in formulating and enacting policy in general. At the constitutional level, individual criminal actions, to take one example, have been the dominant mode of formulating limits on criminal procedure.²⁶

The major part of the answer lies elsewhere: problems raised by suits that are, in effect, challenges to the government’s anti-terrorism policies. What is the proper role of the courts in such challenges? They inevitably produce calls for judicial deference in matters of national security, calls which are often heeded.²⁷ *Boumediene v. Bush* led to a sharp exchange within the Court over whether the decision represented judicial usurpation of power over national security policy.²⁸ The Supreme Court’s apparent assertiveness in habeas corpus cases such as *Boumediene* may not carry over to other forms of suits attacking anti-terrorism policies. Certainly, the result in *Iqbal* suggests this conclusion,²⁹ as does the more recent decision in *Holder v. Humanitarian Law Project*.³⁰ Habeas actions may occupy a central place in the constitutional order that damages suits do not.³¹ Thus, there are practical and theoretical problems with the notion of the

23. *Id.* at 163.

24. 42 U.S.C. § 1983 (2006).

25. See *infra* text accompanying notes 332–37.

26. E.g., *Mapp v. Ohio*, 367 U.S. 643, 656–57 (1961). Many of these decisions were collateral review actions via federal habeas corpus.

27. See, e.g., *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005).

28. See *Boumediene v. Bush*, 553 U.S. 723, 849–50 (2008) (Scalia, J., dissenting).

29. *Iqbal* was the first post-September 11 Supreme Court decision in a damages suit. Its predecessors involved habeas corpus. The Court found, or suggested, several ways in which the plaintiff’s claim was deficient. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952–54 (2009).

30. 130 S. Ct. 2705 (2010). *Holder* was a pre-enforcement challenge to an anti-terrorism criminal statute. The Court specifically invoked deference and embraced the “preventive” approach to terrorism. See *id.* at 2728.

31. See Brown, *supra* note 16, at 895–900 (discussing the distinction between habeas corpus cases and damages suits).

constitutional tort action as the legal and political systems' preferred means of achieving truth and reconciliation goals. Yet, it may be the most important one we have.

Injunctions will rarely be available.³² Prosecutions on any large scale are unlikely.³³ Other institutions are, of course, potentially available. The existing mix of inspectors general and congressional committees can lead to reports and hearings that help us learn about past practices and shape future ones.³⁴ The more potent of the two—congressional hearings—can suffer from the same partisanship that weakened the initial proposal to create a truth and reconciliation commission. Perhaps that proposal should be definitively scrapped in favor of something like the 9/11 Commission with a broad and open mandate. Whether the political system is up to the task is an open question.³⁵ For the moment, the legal system's contribution—the civil suit, particularly the constitutional tort suit—is the major truth and reconciliation vehicle available.

This Article first considers briefly, in Part II, the concept of a truth and reconciliation commission as advanced by Senator Patrick Leahy. As argued above, there are basic flaws in his approach. The analysis concludes that an essentially retributive commission will almost certainly not be formed. Part III begins by examining the concept of accountability—the core of any truth and reconciliation effort. It advances the proposition that reverse war on terror suits are serving, by default, as

32. See, e.g., *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 635 (S.D.N.Y. 2009) (finding plaintiffs lacked standing to bring pre-enforcement challenge to amendment of the Foreign Intelligence Surveillance Act). Most potential plaintiffs will lack standing either because they cannot show that a wrong happened to them at all or because they cannot show one will happen again. Moreover, the action for an injunction can put a court in the position of exercising a form of ongoing control over a coordinate branch in the area of national security.

33. See Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 94 (2008) (“[A] government employee is effectively immune from both civil claims and criminal prosecution for actions undertaken in reliance upon an Attorney General opinion.”). Prosecutions would be extremely controversial. They also have a hit-or-miss quality. Many possible defendants will escape prosecution because they relied in good faith on legal advice, evidence is unavailable, or the statute of limitations has run. See Press Release, Matthew Miller, Dir., Dep’t of Justice Office of Pub. Affairs, Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel (Nov. 9, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html> (noting, “In January 2008, Attorney General Michael Mukasey appointed Assistant United States Attorney John Durham to investigate the destruction by CIA personnel of videotapes of detainee interrogations. Since that time, a team of prosecutors and FBI agents led by Mr. Durham has conducted an exhaustive investigation into the matter. As a result of that investigation, Mr. Durham has concluded that he will not pursue criminal charges for the destruction of the interrogation videotapes.”).

34. See generally Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357 (discussing accountability mechanisms, primarily in the executive branch).

35. See THE NAT’L COMM’N ON THE TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

the society's principal accountability vehicle. For example, they perform accountability functions—such as revealing how anti-terrorism efforts were conducted and forcing the government to present legal justifications for that conduct. I examine the extensive limits on the ability of these suits to perform that role as well as the possibility that those limits may be relaxed.

Part IV asks why the legal system imposes such severe constraints. I consider two explanations. First, the limits flow from underlying concerns about the ability of the tort suit to serve broad goals of examination and evaluation of governmental policy, particularly when the imposition of constitutional restrictions is at stake. This is, at best, a partial explanation. I offer a complementary one: the general limits on the constitutional tort suit apply with particular force in the context of the war on terror. Concerns of judicial deference to the political branches are at their highest when national security is at issue. These concerns limit the courts' normal ability to examine individual assertions of rights, let alone to function as bodies of national inquiry.

The Article concludes that reverse war on terror suits are, at best, a default approach. There is a serious question whether they should, or should be expected to, play the role of America's primary truth and reconciliation vehicle.

II. THE TRUTH AND RECONCILIATION COMMISSION THAT WASN'T

The idea of a truth and reconciliation commission to examine the Bush administration's anti-terrorism efforts has had a somewhat checkered history. The concept of a commission appears to have been formally launched by Senator Patrick Leahy (D-VT) in a speech at Georgetown University on February 9, 2009.³⁶ He called for "a reconciliation process and truth commission," whose "straightforward mission would be to find the truth."³⁷ The truth about *what* was not clear. Senator Leahy invoked both anti-terrorism efforts—"warrantless wiretapping [and] torture"—and broader issues such as "politicized hiring at the Department of Justice."³⁸ Although Representative John Conyers (D-MI) filed legislation in the House "[t]o establish a national commission on presidential war powers and civil liberties,"³⁹ the focus has been on Senator Leahy's efforts. Rather than file a bill, Senator Leahy apparently hoped to drum up public and legislative support for the idea before proceeding with it. His initial efforts fell flat. After a March hearing that was something of a farce, the *Washington Post* reported that "[t]hings aren't looking so good for the

36. Leahy, *supra* note 4.

37. *Id.*

38. *Id.*

39. *Getting to the Truth Through a Nonpartisan Commission of Inquiry: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–2 (2009) (statement of Sen. Patrick J. Leahy) [hereinafter *Truth Hearing*].

Truth Commission.”⁴⁰ At one point, Senator Leahy’s strategy seemed reduced to circulating an online petition via YouTube.⁴¹

Whether this uncertain trumpet is a partisan one might initially seem open to debate. After all, Senator Leahy evoked a nonpartisan commission that would seek “a mutual understanding of what went wrong and . . . learn from it,”⁴² and insisted that his goal is not “vengeance, [but] a fair-minded pursuit of what actually happened.”⁴³ But he has had a hard time cloaking his real goal: exposing the fundamentally evil nature of the Bush administration through “accountability for what has been a dangerous and disastrous diversion from American law and values.”⁴⁴ Blogging in the *Huffington Post*, the Senator minced no words: “We have just emerged from a time when White House officials often acted as if they were above the law. That was wrong and must be fully exposed so it never happens again.”⁴⁵ The post is replete with references to Bush administration “abuses” and “misdeeds.”⁴⁶ The Bush administration represents “eight corrosive years,” a “dark chapter in American history . . .”⁴⁷ The commission’s role would be to provide an “understanding of the failures of the recent past, so we do not repeat them in the future.”⁴⁸

As of this writing, the proposal seems dead in the water. There are three principal reasons. The first is the fundamental ambivalence between the inquiry model and the retributive model. The movement for the commission had a strong tilt toward the latter, which made it impossible to view the proposal as one for an objective inquiry that could garner support from all sides of the political spectrum. Even leaders of Senator Leahy’s own party were not interested in a witch hunt. There is a second reason why the proposal has lost whatever luster it may have had. Many of the policies that the commission would investigate are still in place. As Professor Jack Goldsmith wrote in *The New Republic* four months after President Obama’s inauguration, “[t]he new administration has copied most of the Bush program, has expanded some of it, and has narrowed only a bit.”⁴⁹ Each month brings new revelations of continuity on matters

40. Dana Milbank, *Facing the Cold, Hard Truth*, WASH. POST, Mar. 5, 2009, at A3. “Chief Pursuer of Truth Patrick Leahy cut a lonely figure yesterday as he tried to persuade the Senate Judiciary Committee to endorse his plan for . . . a commission to probe the Bush administration’s treatment of suspected terrorists.” *Id.*

41. See, e.g., Bush Truth Commission, <http://www.bushtruthcommission.com> (last visited Oct. 23, 2010).

42. *Truth Hearing*, *supra* note 39.

43. Leahy, *supra* note 4.

44. *Id.*

45. Patrick Leahy, *A Truth Commission to Investigate Bush-Cheney Administration Abuses*, HUFFINGTON POST (Feb. 12, 2009, 2:38 PM), http://www.huffingtonpost.com/sen-patrick-leahy/a-truth-commission-to-inv_b_166461.html.

46. *Id.*

47. *Id.*

48. *Id.*

49. Jack Goldsmith, *The Cheney Fallacy*, NEW REPUBLIC (May 18, 2009, 12:00 AM),

ranging from “extraordinary rendition” to the executive power to detain.⁵⁰ This continuity is striking, even given the possibility that later Bush administration policies represented a retreat from the initial hard line. A third reason why the idea of a truth and reconciliation commission did not take hold in the United States is that the South African model rested on radically different preconditions from inquiry into the Bush administration’s anti-terrorism policies.⁵¹ In sum, Senator Leahy’s proposal is unlikely to go anywhere.

III. CIVIL LIABILITY AND ACCOUNTABILITY—THE PROS AND CONS

A. *Liability as an Accountability Mechanism*

1. The Concept of Accountability

Discussions of examining Bush-era policies, whether through a commission or some other vehicle, inevitably involve calls for “accountability.”⁵² Although the term is widely used, it is not easily defined. One analyst refers to it as “elusive and controversial, with theoretical debates under way almost constantly.”⁵³ Nonetheless, there are common themes to most discussions. As Dean Martha Minow puts it, “[a]ccountability . . . means being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations.”⁵⁴ Professor Robert Gregory offers the following helpful elaboration:

Because accountability concerns are most commonly apparent when public power and authority have been abused or misused the term tends to have negative connotations. It is more likely to be used in public discourse when consequences flow from actions or inactions that are generally considered to be deleterious to the polity as a whole or to particular groups or individuals within it. . . . [P]eople frequently express concerns over accountability when they believe there has been

<http://www.tnr.com/article/politics/the-cheney-fallacy>.

50. E.g., Editorial, *Obama’s Kangaroo Courts*, BOS. GLOBE, May 20, 2009, at A12 (criticizing continued use of military tribunals).

51. Balkin, *supra* note 7.

52. E.g., Editorial, *Impunity or Accountability*, N.Y. TIMES, Dec. 15, 2009, at A40; Editorial, *Rendition, Torture and Accountability*, N.Y. TIMES, Nov. 19, 2007, at A22.

53. Paul G. Thomas, *Accountability: Introduction*, in HANDBOOK OF PUBLIC ADMINISTRATION 549, 549 (B. Guy Peters & Jon Pierre eds., 2003). For a helpful application of accountability concepts to a particular situation, see Ryan M. Scoville, Note, *Toward an Accountability-Based Definition of “Mercenary,”* 37 GEO. J. INT’L L. 541, 562–81 (2006).

54. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003).

none or too little of 'it'. What is usually meant is that certain persons or organizations are illegitimately evading at least one of three things, if not all three: their need to explain events and circumstances; their own complicity in them; or blame and sanction for that complicity. Thus, accountability is identified with the demand that when things go wrong, 'heads should roll'.⁵⁵

What does the concept mean in practice? In an important article, Professor Kathleen Clark develops a "process of accountability [with] four distinct stages."⁵⁶ The first stage is "informing," in which "the accountor provides information relating to its conduct."⁵⁷ "The second stage is justification, where the accountor attempts to provide a justification for its conduct."⁵⁸ The third stage is [an] evaluation, in which "that justification is examined and judged."⁵⁹ "[T]he final stage is rectification," a process that can lead to "a penalty or [other] remedy" if the justification is inadequate.⁶⁰ Rectification might take the form of "incapacitation" for future office holding, "deterrence" through punishment, "compensation" to those harmed, and "symbolic expression" authoritatively declaring the malfeasance and why it was wrong.⁶¹ Not all accountability mechanisms can lead to all four stages.⁶² Although I find Professor Clark's analysis extremely helpful, it may be desirable to separate the fourth stage into three sub-components: compensation, deterrence (whether of the offending official or future ones), and general guidance.⁶³

2. Civil Suits as Accountability Mechanisms

The civil suit *can* lead to all of the stages. Indeed, there is mounting evidence that the suits generated by the war on terror are intended to, and might, serve as accountability mechanisms. A number of high profile suits have been filed, naming as defendants present and former officials at all levels, including the (former) Attorney General, the Director of the FBI, a

55. Robert Gregory, *Accountability in Modern Government*, in HANDBOOK OF PUBLIC ADMINISTRATION 557, 558 (B. Guy Peters & Jon Pierre eds., 2003); *see also* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1417–18 (2009) (discussing the importance of accountability to third parties on "decisionmakers who are aware that their judgments will be reviewed by an outsider").

56. Clark, *supra* note 34, at 361.

57. *Id.* (formatting removed).

58. *Id.* at 362 (formatting removed).

59. *Id.* (formatting removed).

60. *Id.* (formatting removed).

61. *Id.*

62. *Id.*

63. For Professor Clark, this is a broad category that can include "symbolic expression" as well as authoritative judgment as to legality. *Id.*

former top Justice Department official, and senior military officials.⁶⁴ Grievances include unconstitutional detention,⁶⁵ unconstitutional conditions of confinement, “extraordinary rendition” leading to torture,⁶⁶ and legal advice that set in motion unconstitutional conduct.⁶⁷ Plaintiffs certainly assert constitutional torts leading to serious injuries, but compensation may not always be the “stage” of accountability that most concerns them. Jose Padilla sued John Yoo for \$1 in damages based on the constitutional injuries allegedly caused by Yoo’s legal advice.⁶⁸ Canadian citizen Maher Arar has already received over \$10 million from the Canadian government for its part in his extraordinary rendition.⁶⁹

Lawyers close to the suits see them as a chance to force Bush administration practices into the open. As the Associated Press reported: “Critics of George W. Bush’s administration see the recent actions of the courts as a chance to wring a measure of *accountability* from the Bush White House — at a time when Obama expresses reluctance to look backward and Congress has shown little appetite for investigating the past.”⁷⁰ Academic observers of the lawsuits see them the same way. Professor David Zaring has examined “[t]he high-profile policy-directed tort suit.”⁷¹ In his view, “[t]hese suits are more symbolic than likely to succeed, in that they rely not on the verdict, but on the ability to make a claim against a policy-maker.”⁷² “[L]itigants may not expect the courts to award them damages as much as they hope to remind the public that senior government officials have blessed an extraordinary rendition program, written opinions on tough interrogation techniques, or outed a covert agent.”⁷³ Professor Peter Margulies views them as a form of “crossover advocacy.”⁷⁴

All of these observers see the reverse war on terror lawsuits as accountability mechanisms. Application of Professor Clark’s concept of stages of accountability helps prove the point. “Informing” certainly

64. *E.g.*, *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

65. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

66. *Arar*, 585 F.3d at 563.

67. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1014–15 (N.D. Cal. 2009).

68. First Amended Complaint at 19–21, *Padilla*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 3:08-cv-00035), 2008 WL 2433172.

69. See Editorial, *A National Disgrace*, N.Y. TIMES, Nov. 11, 2009, at A30 (indicating the amount of Canada’s offered settlement with Arar); Editorial, *The Unfinished Case of Maher Arar*, N.Y. TIMES, Feb. 18, 2009, at A26 (discussing the Canadian government’s treatment of Arar).

70. Mark Sherman, *Ex-Bush Officials Face Lawsuits over Their Actions*, ASSOCIATED PRESS, Sept. 29, 2009, 2009 WLNR 19286421 (emphasis added).

71. David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 339 (2009).

72. *Id.* at 335.

73. *Id.*

74. Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 348–49 (2009).

occurs, even though in the initial phase of civil litigation it is not the accountant (the defendant) who provides the information. The plaintiff—who might be viewed as the account-holder—does so through his or her complaint. Of course, the accountant may be forced, through discovery, to amplify the available information. But, even at the complaint stage, one version of the accountant's conduct becomes public. Professor Clark's second stage of "justification" does not usually happen right away. The defendant will almost certainly assert non-merits defenses such as immunity, state secrets, or failure to satisfy cause of action requirements such as those required for a *Bivens* claim.⁷⁵ Some of these defenses may involve a degree of justification—for example, an immunity defense contending that the asserted conduct did not violate a constitutional right, or, at least, a clearly established one.⁷⁶ Of course, if the case proceeds, merits defenses will usually involve justification. A judgment on the merits will normally involve an evaluation. Even judicial resolution of non-merits defenses may involve a good deal of evaluation. As for the rectification stages, much depends on whether a judgment is reached and what it is. An ultimate judgment on the merits could lead to compensation, deterrence, and guidance.

B. *An Initial Theoretical Foundation—Marbury*

The numerous obstacles they face call into serious question the practical value of civil suits as accountability mechanisms. But as a theoretical matter, any defense of civil suits as an accountability mechanism can rely on the ultimate trump card in American public law discourse: *Marbury v. Madison*.⁷⁷ Perhaps the most important quote in that highly quotable case is Chief Justice Marshall's declaration that:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.⁷⁸

Marbury's grievance was against the government. He sued a government official to remedy it, and Marshall made it clear that such suits are at the core of the judicial role. The reference to English practice is telling: if absolute monarchs submit themselves to that duty, the officials of a republic should a fortiori do so.

In a spirited defense of the *Bivens* constitutional tort action—the

75. See Brown, *supra* note 16, at 883–86 (discussing problem of "special factors" exception to *Bivens*).

76. See *Developments in the Law—Access to Courts*, *supra* note 18, at 1163.

77. 5 U.S. (1 Cranch) 137 (1803).

78. *Id.* at 163.

archetype of the reverse war on terror suit—Professor Susan Bandes invokes the *Marbury* principle as follows:

Conceptually, though not chronologically, *Bivens* is a short step from *Marbury*. To uphold the rights of individuals before the Court, the Court must prevent encroachment on those rights by the political branches. More than a century and a half after *Marbury*, *Bivens* ratified judicial enforcement of the limits on governmental excess. The use of the Constitution as a sword; the willingness to enforce limits, which is the animating principle behind *Bivens*, rests on the notion of positive checks on government espoused in *Marbury*. It is inconsistent with a version of the separation of powers doctrine which views the tripartite functions as sharply separated, and the judiciary as passive in the face of incursions by the political branches.⁷⁹

Professors Richard Fallon and Daniel Meltzer elaborate on the distinction between the *Marbury* principle of a remedy for every right and “[a]nother principle, whose focus is more structural, [that] demands a system of constitutional remedies adequate to keep government generally within the bounds of law.”⁸⁰ Of course, an Article III-based system that requires a case or controversy (in particular, a plaintiff who has suffered harm) often blends what Fallon and Meltzer call “providing effective remediation to individual victims” with “ensuring governmental faithfulness to law.”⁸¹ Reverse war on terror suits—given the fact that they are tort actions—seek to further both goals.

C. Limits on the Reverse War on Terror Suit

1. The Cause of Action Problem

Most civil suits by victims of the war on terror will be constitutional torts brought under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁸² *Bivens* permits plaintiffs who assert constitutional violations to proceed directly against the relevant federal officials despite the lack of a statutory authorization analogous to § 1983.⁸³ However, *Bivens* has been a controversial doctrine since its promulgation

79. Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 311 (1995) (footnotes omitted).

80. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

81. *Id.* at 1789.

82. 403 U.S. 388 (1971).

83. See Brown, *supra* note 16, at 869–70 (discussing parallel nature of the two remedies).

in 1971⁸⁴ and has recently seemed to be in sharp decline, almost to the point of being “disfavored.”⁸⁵ It is, to a substantial extent, an exercise in judicial policymaking,⁸⁶ and policies can cut more than one way. From the beginning, the Court indicated that a *Bivens* action might not proceed if (1) a case presented “special factors counselling [sic] hesitation”;⁸⁷ or (2) Congress had declared that constitutional plaintiffs seeking damages from a federal officer “may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”⁸⁸ For the last two decades, the Court has been cutting back substantially on the availability of *Bivens* suits, and the “special factors” doctrine has played the major role in *Bivens*’ decline.⁸⁹ Reverse war on terror suits bristle with such questions as judicial deference to the executive in matters of military affairs and national security. These are precisely the sorts of questions that seem to constitute “special factors counselling [sic] hesitation.” The point has not been lost on the lower courts, which have tended to dismiss war on terror *Bivens* actions on precisely this ground.⁹⁰ As of this writing, the Supreme Court has not addressed the matter.⁹¹ A striking example of the attitude of, and divisions within, the lower federal courts can be found in the Second Circuit’s en banc opinion in *Arar v. Ashcroft*.⁹² *Arar* was a damages action against high-level federal officials based on injuries the plaintiff claimed to have

84. See, e.g., Bandes, *supra* note 79, at 293–94 (discussing controversial nature of doctrine).

85. See *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 94 (D.D.C. 2007).

86. See *Bivens*, 403 U.S. at 399, 403–04 (Harlan, J., concurring) (emphasizing the policymaking nature of remedial decisions).

87. *Id.* at 396 (majority opinion).

88. *Id.* at 397.

89. In *Wilkie v. Robbins*, 551 U.S. 537 (2007), the Court examined the alternative remedies available but based its conclusion of no *Bivens* remedy primarily on special factors analysis. *Id.* at 549–62. Alternative remedies played an important role in such early cases as *Carlson v. Green*, 446 U.S. 14, 18–19 (1980), but the Court’s emphasis during the retrenchment period of the 1980s shifted to special factors and sometimes conflated the two exceptions by treating the existence of an alternate remedy as a special factor. Alternate remedy analysis resurfaced in the Court’s most recent denial of a *Bivens* action in *Hui v. Castaneda*, 130 S. Ct. 1845, 1850 (2010). *Hui* involved a statute that provided that in damages actions against Public Health Service personnel, the Federal Tort Claims Act remedy against the United States is exclusive. A unanimous Court treated the case as governed by the plain language of the statute, which it read as providing immunity from individual suits. Plaintiff’s attempt to assert a *Bivens* claim was thus denied. The Court did not engage in analysis of the alternative remedy exception, stating that “[w]e express no opinion as to whether a *Bivens* remedy is otherwise available in these circumstances, as the question is not presented in this case.” *Id.* at 1852 n.6. The Court of Appeals had engaged in an extensive consideration of the issue. See *Castaneda v. United States*, 546 F.3d 682, 688–700 (9th Cir. 2008), *rev’d sub nom.* *Hui v. Castaneda*, 130 S. Ct. 1845 (2010).

90. E.g., *In re Afg. Detainees Litig.*, 479 F. Supp. 2d at 107.

91. The Court’s most recent action was the denial of certiorari in *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010), discussed *infra* text accompanying notes 93–102.

92. 585 F.3d 559, 563–82 (2d Cir. 2009) (en banc).

suffered as a result of his “extraordinary rendition” to Syria.⁹³ His claims, based primarily on a *Bivens* theory, were largely rejected by the district court⁹⁴ and a circuit panel majority.⁹⁵ By a 7-4 margin, the circuit court affirmed the rejection en banc,⁹⁶ and the Supreme Court denied certiorari.⁹⁷ Given the denial of certiorari, this decision stands as that of the highest ranking court to address these issues. The en banc decision is a remarkable discussion not only of *Bivens* and related issues but of the broader question of the role of the courts in the war on terror.

The majority stated that “[a]lthough this action is cast in terms of a claim for money damages against the defendants in their individual capacities, it operates as a constitutional challenge to policies promulgated by the executive.”⁹⁸ The theme of damage suits as, in effect, suits against the government to challenge policy is an important conceptual underpinning of the opinion. Its major ground, however, was the limited competence of courts in areas of “foreign policy and national security.”⁹⁹ The latter, more familiar, argument is a recurring theme in national security litigation.¹⁰⁰ It is, of course, in some tension with *Marbury* and with the view of courts as vindicators of rights in all contexts.¹⁰¹ The majority recognized this view but sidestepped the issue by invoking the superior competence of Congress to decide such matters as the availability of judicial remedies for claims such as Arar’s.¹⁰²

As for *Bivens* issues, *Arar* arose after a prolonged period of Supreme Court hostility toward the constitutional tort action. In 2007, the Court stated:

[W]e have . . . [h]eld that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.¹⁰³

The Court caused some confusion when it opposed extending *Bivens* to

93. *See id.* at 565–67 (detailing allegations).

94. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287–88 (E.D.N.Y. 2006).

95. *Arar v. Ashcroft*, 532 F.3d 157, 192–93 (2d Cir. 2008).

96. *Arar*, 585 F.3d at 582.

97. *Arar v. Ashcroft*, 130 S. Ct. 3409, 3409 (2010).

98. *Arar*, 585 F.3d at 574.

99. *Id.* at 575.

100. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 579, 585–86 (Thomas, J., dissenting).

101. *E.g.*, *Hamdi*, 542 U.S. at 535 (majority opinion).

102. *Arar*, 585 F.3d at 580–81.

103. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

new “contexts.”¹⁰⁴ The meaning of “context” was uncertain.¹⁰⁵ The *Arar* majority defined context as a “potentially recurring scenario that has similar legal and factual components.”¹⁰⁶ It viewed the context in *Arar* as extraordinary rendition; the existence of this new context triggered the “special factors” inquiry.¹⁰⁷ The court was quick to find such factors. It again emphasized the presence of national security issues and lack of judicial competence to deal with them.¹⁰⁸ Indeed, it viewed the exception as triggered whenever special factors were *identified*—thus rejecting a balancing approach¹⁰⁹—and stated that the resultant exercise of judicial discretion was appropriate whenever hesitation was counseled, not required.¹¹⁰

Arar appears to be a negative decision in its attitude toward, and resolution of, the *Bivens* remedy. The majority certainly thought its result was consistent with both the results and reasoning of Supreme Court precedents since the 1980s denying the remedy. However, one commentator has contended that the en banc opinion included “one analytical move that could actually prove *beneficial* to plaintiffs.”¹¹¹ The argument is that following the Second Circuit approach would require a court to find the existence of a new context *before* examining whether special factors (or an adequate alternate remedy) exist. Under this view, it might be sufficient for a plaintiff to show the existence of a *Bivens* precedent that granted protection to the interests or right asserted.¹¹² Such a finding would mean that the plaintiff did not seek an extension of *Bivens* to a new context; thus, it would be unnecessary to reach the exceptions. Hope and creativity spring eternal, but this analysis—turning an anti-plaintiff decision into a pro-plaintiff one—seems highly vulnerable on at least two grounds. First, the meaning of context is still uncertain. Moreover, even if a *Bivens* remedy had been previously recognized in a particular context, the presence of war on terror factors might still counsel hesitation. The latter contention was the key to *Arar*.

Indeed, after *Arar*, it is no easier than before to answer the question of what constitutes a special factor counseling hesitation in a war on terror *Bivens* case. The Second Circuit opinion apparently rejects a broad approach—such as viewing the entire war on terror as a new context that constitutes a special factor¹¹³—in favor of a narrower approach that

104. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

105. *See Brown*, *supra* note 16, at 855–62.

106. *Arar*, 585 F.3d at 572.

107. *Id.*

108. *Id.* at 574–76.

109. *Id.* at 573–74.

110. *Id.* at 574.

111. Recent Cases, *Second Circuit Holds that Alleged Victim of Extraordinary Rendition Did Not State a Bivens Claim*. — *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (*en banc*), 123 HARV. L. REV. 1787, 1790 (2010).

112. *Id.* at 1793.

113. *See Brown*, *supra* note 16, at 888 (discussing treating the war on terror in its entirety as a

identifies specific aspects of the war on terror—such as extraordinary rendition—as new contexts which may present special factors.¹¹⁴ However, it finds special factors—such as deference to the political branches—that can apply to any aspect of the war on terror. This seemingly context-specific opinion appears to camouflage a general approach.

Without *Bivens*, most reverse war on terror suits will not survive the pleading stage. The *Bivens* debate raises the question of whether the special factors exception should serve as a general, almost inflexible obstacle or whether a more differentiated response is desirable at the threshold stage. The district court's initial opinion in *Padilla v. Yoo*¹¹⁵ illustrates the latter possibility.¹¹⁶ Yoo had been a high-level Justice Department official in the Bush administration. Padilla's principal claim was that Yoo's legal advice had laid the groundwork for Padilla's mistreatment.¹¹⁷ In denying a motion to dismiss, the district court utilized a fact-specific analysis to reject special factors arguments centered on national security. It emphasized that Padilla's complaint did not involve battlefield issues or relations with foreign governments.¹¹⁸ It thus was able to distinguish the *Arar* lower court reasoning that was vindicated on appeal and en banc.

The *Arar* dissenters sounded many of the usual themes, including the role of courts in protecting individual liberties even when intrusion into national security might occur.¹¹⁹ The *New York Times* took a strong editorial stance, characterizing the denial of certiorari as “disgraceful.”¹²⁰ Not surprisingly, the dissenters disagreed with the majority on the application of the *Bivens* doctrine, denying that the case represented a new context and treating special factors as a limited exception. The dissenters saw *Bivens* as a blunt instrument in reverse war on terror litigation—“barring all . . . plaintiffs at the courtroom door without further inquiry.”¹²¹ Interestingly, they suggested use of the state secrets privilege,¹²² discussed below,¹²³ as a possible differentiating mechanism to allow further proceedings in those *Bivens* actions in which damages of intrusion on national security were minimal. This would be a surprising turn of events. The privilege—particularly its use by the Bush administration—has been reviled by those who want to see more reverse war on terror suits.¹²⁴

special factor).

114. *Arar*, 585 F.3d at 572.

115. 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

116. *Id.* at 1019–20.

117. *See id.* at 1014–17.

118. *Id.* at 1025.

119. *Arar*, 585 F.3d at 612 (Parker, J., dissenting).

120. Editorial, *No Price to Pay for Torture*, N.Y. TIMES, June 16, 2010, at A30.

121. *Arar*, 585 F.3d at 603 (Sack, J., concurring in part and dissenting in part).

122. *Id.* at 605–11.

123. *See infra* text accompanying notes 283–302.

124. Editorial, *Unraveling Injustice*, N.Y. TIMES, Feb. 5, 2009, at A30 (criticizing Bush administration use of privilege, and stressing importance of civil suits for examining misconduct).

An alternative route for some of the claims that might be presented in a *Bivens* action is the Religious Freedom Restoration Act (RFRA).¹²⁵ Indeed, the potential use of RFRA in suits such as those discussed in this Article is emerging as a cutting edge issue in reverse war on terror litigation. RFRA is a complex statute with a complex history.¹²⁶ The most pertinent part provides as follows:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.¹²⁷

This statute has several advantages for potential plaintiffs. It overcomes the cause of action problem by providing one. Many persons with conditions of confinement claims will be able to plausibly allege that their confinement included denial of religious materials, interference with prayers, or other practices that "burden . . . exercise of religion."¹²⁸ They will certainly try to go beyond obvious burdens to broader issues of religious discrimination. Moreover, RFRA appears to represent an example of rights conferred by statute. It does not require that the person claiming

and giving remedy to victims).

125. 42 U.S.C. § 2000bb (2006).

126. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussing history and bases of act and striking down its application to state and local governments).

127. 42 U.S.C. § 2000bb-1 (2006).

128. E.g., *Rasul v. Myers (Rasul II)*, 563 F.3d 527, 535 (D.C. Cir. 2009) (asserting condition of confinement claims under the Constitution, international law, and RFRA), *cert. denied*, 130 S. Ct. 1013 (2009).

its protection assert a constitutional right.¹²⁹ At the moment, it is unclear whether *Boumediene*'s extension of habeas corpus rights to Guantanamo applies to other constitutional rights.¹³⁰ Nor is it clear whether *Boumediene*, whatever its principle, applies beyond Guantanamo.¹³¹ It may well be the case, however, that this uncertainty is irrelevant to a RFRA plaintiff asserting a statutory right.

Reverse war on terror plaintiffs have begun to grasp the potential of RFRA and to use it in their suits. For example, Jose Padilla alleged that John Yoo's legal advice and direct personal involvement in the formulation of anti-terrorism policies—as well as his direct involvement in aspects of Padilla's detention—"proximately and foreseeably led to the abuses suffered by [him]."¹³² The claimed deprivations included the following: "denial of any mechanism to tell time in order to ascertain the time for prayer in keeping with the Muslim practice" and "denial of access to the Koran for most of his detention."¹³³

As part of an extensive order largely denying Yoo's motion to dismiss, the Federal District Court for the Northern District of California ruled that a RFRA claim based on these denials could proceed.¹³⁴ The key issue was whether "RFRA allows for individual capacity suits for money damages against federal officers."¹³⁵ The court relied in part on other lower court holdings that it does.¹³⁶ The court also found in RFRA a clear tracking of the language of § 1983.¹³⁷ District court decisions such as *Padilla v. Yoo* might seem to give the green light to a potentially expansive use of RFRA in conditions of confinement cases. There is, however, a significant obstacle: the U.S. Court of Appeals for the District of Columbia Circuit's two decisions in *Rasul v. Myers*,¹³⁸ adopting a narrow definition of the word "person" in RFRA, one which excludes nonresident aliens.¹³⁹

Rasul was a damages action brought by former Guantanamo detainees, based on the conditions of their confinement, against a range of officials.

129. See *Jama v. U.S. Immigration & Naturalization Serv.*, 343 F. Supp. 2d 338, 366–72 (D.N.J. 2004) (discussing statutory and constitutional dimensions of RFRA).

130. See *Rasul II*, 563 F.3d at 529.

131. See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 208–09 (D.D.C. 2009) (holding that *Boumediene* applies beyond Guantanamo), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

132. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1015 (N.D. Cal. 2009).

133. *Id.* at 1014.

134. *Id.* at 1038–39.

135. *Id.* at 1039.

136. *Id.* (citing *Lepp v. Gonzales*, No. C–05–0566 VRW, 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *Jama v. U.S. Immigration & Naturalization Serv.*, 343 F. Supp. 2d 338, 373 (D.N.J. 2004)).

137. *Id.*

138. *Rasul v. Myers (Rasul I)*, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 129 S. Ct. 763 (2008), *on remand*, 563 F.3d 527 (D.C. Cir. 2009).

139. *Rasul I*, 512 F.3d at 671–72; *Rasul II*, 563 F.3d 527, 532–33 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 1013 (2009).

Their causes of action were based on *Bivens*, the Alien Tort Statute,¹⁴⁰ and RFRA. The court initially held that “Guantanamo detainees lack constitutional rights because they are aliens without property or presence in the United States.”¹⁴¹ The court based this view on Supreme Court precedent and its own recent denial of a detainee’s Suspension Clause claim in *Boumediene v. Bush*.¹⁴² This reasoning carried over to the holding that nonresident aliens were not “persons” as that term is used in RFRA.¹⁴³ The court viewed RFRA, as originally enacted, as protecting only “persons” with First Amendment rights.¹⁴⁴ Since the amended version of the statute still used the term “person,” the court concluded that Congress still intended it to exclude those persons who could not assert constitutional rights.¹⁴⁵

The holding in *Rasul* is surprising. It ignores the normal, plain meaning of the term person.¹⁴⁶ It also ignores the fact that the revised version of RFRA no longer defines the “exercise of religion” by reference to the First Amendment.¹⁴⁷ The Supreme Court’s reversal of *Boumediene*¹⁴⁸ cast further doubt on *Rasul*, one of the cases on which it was based. Indeed, shortly thereafter, the Supreme Court vacated *Rasul* and remanded it to the District of Columbia Circuit “for further consideration in light of *Boumediene*.”¹⁴⁹ Undaunted, the circuit court reaffirmed its prior holding as to all claims, including RFRA.¹⁵⁰

The District of Columbia Circuit is, of course, correct in that the applicability of *Boumediene* to constitutional rights beyond habeas—whether at Guantanamo or on a broader basis—is an open question. I have argued that in the *Bivens* context the Court’s receptivity to habeas claims may not extend to substantive claims.¹⁵¹ As for constitutional extra-territoriality, the *Boumediene* majority was careful to leave standing and distinguish precedents such as *Johnson v. Eisenstrager*.¹⁵² RFRA claims are statutory, however. One could read *Boumediene* as reinforcing the

140. 28 U.S.C. § 1350; *see also infra* text accompanying notes 166–84.

141. *Rasul I*, 512 F.3d at 663.

142. 476 F.3d 981, 994 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008).

143. RFRA states, in part, that “[g]overnment shall not substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a) (2006).

144. *Rasul I*, 512 F.3d at 668–72.

145. *Id.*

146. *See id.* at 673–76 (Brown, J., concurring).

147. *But see id.* at 675–76 (recognizing broadening of scope of rights but concluding that it did not broaden the range of individuals concerned).

148. *Boumediene v. Bush*, 553 U.S. 723 (2008).

149. *Rasul v. Myers*, 129 S. Ct. 763, 763 (2008).

150. *Rasul II*, 563 F.3d 527, 532–33 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009). *Rasul*’s treatment of claims under the Alien Tort Statute is discussed *infra* in text accompanying notes 166–86.

151. Brown, *supra* note 16, at 897–900.

152. *Boumediene*, 553 U.S. at 726 (rejecting the reasoning of *Johnson v. Eisenstrager*, 339 U.S. 763 (1950)).

Supreme Court's earlier decision in *Rasul v. Bush*¹⁵³ that statutory habeas corpus was available at Guantanamo.¹⁵⁴ Taken together, the two cases emphasize the importance of the enforceability of rights at Guantanamo. In *Rasul*, a receptive lower court could have allowed the RFRA claim to proceed without reaching the difficult question of constitutional scope. However, in December 2009, the Supreme Court denied certiorari in *Rasul v. Myers*,¹⁵⁵ thus leaving intact, for now, the circuit court's holding on all issues, including RFRA. This holding does not affect claims by U.S. citizens or claims arising within the United States.

RFRA has its limits, even if the District of Columbia Circuit's negative construction is not followed. Not all asserted victims of the war on terror will be able to assert a religious dimension to their claims. I will briefly consider two alternative sources of a cause of action—one narrow, one potentially broad. Plaintiffs asserting torture by the government will seek to invoke the Torture Victim Protection Act (TVPA).¹⁵⁶ A principal goal of that statute is to ensure that an official who "subjects an individual to torture shall, in a civil action, be liable for damages to that individual."¹⁵⁷ Not only does the Act provide an express cause of action, but it also defines "torture" quite broadly.¹⁵⁸ The statute is limited, however, to acts committed "under actual or apparent authority, or color of law, of any foreign nation."¹⁵⁹ In *Arar*,¹⁶⁰ the Second Circuit panel, in affirming a district court ruling, held that this limitation precluded a TVPA action against American officials, even when the plaintiff alleged that they had worked closely with Syrian officials in an "extraordinary rendition."¹⁶¹ The court issued what seems to be a per se ruling that the American officials would have to act under the "control or influence"¹⁶² of a foreign state, to the point that their power could be seen as "*derived*" from that state.¹⁶³ The en banc majority agreed, stating that in order to state a claim under the TVPA, *Arar* would have had to allege that the defendant officials "possessed power under Syrian law."¹⁶⁴ The court rejected the dissent's argument from § 1983 precedents dealing with the possibility that non-state actors' involvement with state officials turns the formers' conduct into state action.¹⁶⁵ The majority's view—that federal officials act under

153. 542 U.S. 466 (2004).

154. *Id.* at 484.

155. 130 S. Ct. 1013, 1014 (2009) (mem.).

156. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 notes (2006)).

157. *Id.* § 2(a)(1).

158. *See id.* § 3(b)(1).

159. *Id.* § 2(a).

160. 532 F.3d 157 (2d Cir. 2008), *aff'd on reh'g*, 585 F.3d 559 (2d Cir. 2009) (en banc).

161. *Arar*, 532 F.3d at 176 (discussing problem of joint action).

162. *Id.*

163. *Id.*

164. *Arar*, 585 F.3d at 568.

165. *Id.* at 568 n.3.

color of federal law even when they cooperate closely with foreign officials—seems a more accurate description of the relevant legal relationships. Thus, it is unlikely that the TVPA will overcome cause of action problems in reverse war on terror suits. There is, however, a broader possibility for some plaintiffs.

Non-citizen claimants can attempt to assert their non-constitutional claims through the seemingly broad vehicle of the Alien Tort Statute (ATS),¹⁶⁶ which provides that the “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶⁷ This statute solves the cause of action problem, and its coverage of grievances governed by treaties and international law could get many plaintiffs past the pleading stage. Some of these complaints could also embrace constitutional claims. This may be the case notwithstanding the Supreme Court’s admonition in *Sosa v. Alvarez-Machain*—the foundational ATS case—that “federal courts should not recognize [private] claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-Century paradigms familiar when § 1350 was enacted.”¹⁶⁸

The (perhaps insurmountable) obstacle to any use of the ATS is the Westfall Act,¹⁶⁹ which governs generally non-constitutional tort actions against federal employees or officials. The Act provides:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.¹⁷⁰

This language triggers the Federal Tort Claims Act (FTCA),¹⁷¹ which contains an exhaustion requirement.¹⁷² This requirement proved fatal to the ATS claims of the former detainees in *Rasul* brought against Defense Department and military officials. The District of Columbia Circuit affirmed dismissal of these claims because “[t]he record is devoid . . . of any suggestion that they complied with any of the procedures governing

166. 28 U.S.C. § 1350 (2006).

167. *Id.*

168. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004).

169. Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 16 U.S.C. § 831c-2 (2006); 28 U.S.C. §§ 1 note, 2671, 2671 notes, 2674, 2679, 2679 notes (2006)).

170. 28 U.S.C. § 2679(d)(1) (2006).

171. 28 U.S.C. §§ 2671–2680 (2006).

172. *Id.* § 2675(a).

the filing of an administrative claim with DoD or one of the military departments.”¹⁷³ Even assuming exhaustion is satisfied, the FTCA contains a number of exceptions that can bar relief for reverse war on terror plaintiffs. These include, for example, activities that took place in a foreign country¹⁷⁴ and those that involve exercise of a “discretionary” function.¹⁷⁵

The key point in the suit thus becomes the validity of the Attorney General’s scope of employment certification. Courts will entertain a challenge to a certification, although it is *prima facie* evidence of scope of employment.¹⁷⁶ The plaintiff bears the burden of rebutting the certification. *Rasul* shows how onerous this burden can be. The plaintiffs argued that torture *cannot* be within the scope of employment.¹⁷⁷ Relying on both precedent and the *Restatement (Second) of Agency*,¹⁷⁸ the District of Columbia Circuit rejected this argument and affirmed the district court’s decision.¹⁷⁹

The court of appeals did not focus on the military, war on terror context, but it relied heavily on scope of employment cases primarily from the private sector. For example, a deliveryman acted within the scope of his employment “when he assaulted and raped a customer.”¹⁸⁰ A laundromat employee acted “within [the] scope of his employment when he shot [a] customer during [a] dispute over removal of clothes from [a] washing machine.”¹⁸¹ These disputes—in which the employer was held liable—arose out of the conduct of the employer’s business. By analogy, “the detention and interrogation of suspected enemy combatants is a central part of the defendants’ duties as military officers charged with winning the war on terror.”¹⁸² The District of Columbia Circuit Court emphasized that the *Restatement* declares that “criminal conduct is not *per se* outside the scope of employment.”¹⁸³ One can question this aspect of *Rasul* on at least two levels. The plaintiff’s principal claim was based on

173. *Rasul I*, 512 F.3d 644, 661 (D.C. Cir. 2008).

174. 28 U.S.C. § 2680(k) (2006).

175. *Id.* § 2680(a); *see also, e.g.*, Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 742–50 (2006). Professor Richard Henry Seamon concludes that “precedent strongly suggests that the formulation of the policies that have led to the torture of suspected terrorists involves the kind of discretion that the discretionary function clause protects. The policies are ‘susceptible to’ considerations of public safety, foreign intelligence needs, military strategy, and foreign relations.” *Id.* at 749.

176. *Rasul I*, 512 F.3d at 655 (citing *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006)).

177. *Id.* at 656.

178. *E.g., id.* at 655–56 (applying *Restatement* factors).

179. *Rasul I*, 512 F.3d at 656–61; *Rasul II*, 563 F.3d 527, 533 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

180. *Rasul I*, 512 F.3d at 657; *see* *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976).

181. *Rasul I*, 512 F.3d at 657–58 (citing *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981)).

182. *Id.* at 658.

183. *Id.* at 659.

torture. Torture is a violation of fundamental values recognized in statutes, treaties, and, by implication, the Constitution.¹⁸⁴ As Professor David Cole puts it, “[t]orture is different. International and U.S. law provide that torture is never justifiable, under any circumstances, for any reason, in war or peace.”¹⁸⁵ For example, a “necessity defense” cannot be interposed against a claim of torture.¹⁸⁶ On a different level, one can question the use of cases in which the result was to impose liability on the employer as a means to let individual defendants escape liability and remit plaintiffs to the quagmire of the FTCA.

Up to this point, cause of action analysis has focused on the role of the judiciary, both in creating and defining the constitutional tort action in the *Bivens* context and in interpreting the statutory causes of action created by RFRA, TVPA, and ATS. However, Congress’s role may become more important. It might, for example, create private causes of action with more specific connections to the war on terror than these three statutes. A section of the Foreign Intelligence Surveillance Act provides for civil liability if it has been violated.¹⁸⁷ In an important ruling on the National Security Agency’s program on warrantless electronic surveillance, a federal district court awarded damages under this section, although it treated the statute as a waiver of sovereign immunity.¹⁸⁸ Thus, damages were awarded against the government but not against individual officials.¹⁸⁹ Congress might also act to restrict whatever causes of action are available. It has attempted to eliminate jurisdiction over complaints by “enemy combatants”¹⁹⁰ and has provided defenses to claims arising out of interrogation practices.¹⁹¹ Given these steps, it seems unlikely that Congress will act further to ease the cause of action problems described above. As noted, these problems can prevent a potential plaintiff from even bringing a constitutional, or similar, tort action in the war on terror context. Professor Margulies observes that “[i]n decisions that appear most likely to be influential, courts have displayed categorical deference, precluding *Bivens* actions and encouraging officials’ unwise risk-seeking behavior.”¹⁹² Moreover, cause of action

184. See Seamon, *supra* note 175, at 716 n.1 (citing domestic and international law, including the Detainee Treatment Act, which provides that, “‘No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.’”).

185. THE TORTURE MEMOS 7 (David Cole ed., 2009).

186. See *id.* at 23–24 (discussing “necessity” and “self-defense” defenses).

187. 50 U.S.C. § 1810 (2006).

188. *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182, 1193 (N.D. Cal. 2010).

189. *Id.* at 1202–03.

190. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635 (codified as amended at 18 U.S.C. § 2441(e) (Supp. III 2009)).

191. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004, 119 Stat. 2739, 2740 (codified as amended at 42 U.S.C. § 2000dd-1 (Supp. II 2008)).

192. Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 221 (2010).

problems are only the first of many limits.¹⁹³

2. Immunity

The doctrine of immunity is controversial. If the defendant invokes it successfully, the suit is over. Critics have labeled recent immunity developments as a “twentieth century betrayal of founding principles.”¹⁹⁴ Yet, “it is widely believed that some degree of immunity for individual officers is imperative.”¹⁹⁵ The tension between immunity and *Marbury* is particularly significant. For Professor Akhil Amar, it contradicts *Marbury*’s “central tenet” that “every right . . . must have a remedy.”¹⁹⁶ However, the Supreme Court majority in *Nixon v. Fitzgerald*,¹⁹⁷—a decision granting the President absolute immunity—saw the issue in a different light: “[I]t is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong.”¹⁹⁸ Besides immunity, the Court noted the importance of denials of implied rights actions and denials of *Bivens* remedies on special factors grounds.¹⁹⁹ It also noted that “*Marbury* . . . lost his case in the Supreme Court.”²⁰⁰

The obvious question that the existence of immunity poses is what rationale is strong enough to blunt the thrust of *Marbury*. The Supreme Court’s consistent answer to this question has been the need to ensure zeal on the part of public officials when performance of their duties puts them in conflict with citizens.²⁰¹ Here is how the Court in *Nixon* described a foundational 19th Century decision:

Drawing upon principles of immunity developed in English cases at common law, the Court concluded that “[t]he interests of the people” required a grant of absolute immunity to public officers. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way “injuriously affect[ing] the claims of particular individuals,” even when the public interest required bold and unhesitating action. Considerations of “public policy and convenience” therefore compelled a judicial recognition

193. See *Developments in the Law—Access to Courts*, *supra* note 18, at 1163 (concluding that, “[D]etainees face daunting legal challenges to having their claims of wrongful detention, torture and abuse heard in federal court.”).

194. Akil Reid Amar & Neal Kumar Katyal, Commentary, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 709 (1995).

195. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 526 (5th ed. 2007).

196. Amar & Katyal, *supra* note 194, at 707.

197. 457 U.S. 731 (1982).

198. *Id.* at 754 n.37.

199. *Id.*

200. *Id.* at 755 n.37.

201. *E.g., id.* at 753 n.32.

of immunity from suits arising from official acts.²⁰²

Analytically, there are two forms of immunity: absolute and qualified. The former is rare, however. Even those officials who have it—e.g., legislators, prosecutors, and judges—are only immune when sued for functions that are part of the core of the office that creates the immunity in the first place. For example, judges are immune for acts performed in their judicial capacity.²⁰³ Society does not want them to be in fear of a suit by the losing party. They are not immune, however, for administrative or executive acts.²⁰⁴

Qualified, not absolute, immunity is the norm. Prior to 2009, the Court required a two-step inquiry:

First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.²⁰⁵

The Court modified this inquiry in *Pearson v. Callahan*,²⁰⁶ making the first step optional.²⁰⁷ It remains to be seen whether elimination of the first step will impede the articulation of constitutional rights.²⁰⁸ The important point is that the defendant’s immunity is defined by reference to his perception of the plaintiff’s rights and whether that perception was reasonable. Finally, immunity is often analyzed as a right the defendant possesses separate and distinct from the merits—a right not to be tried at all in certain cases.²⁰⁹ Denial of an immunity claim can be appealed at once, under the “collateral order” doctrine.²¹⁰

Qualified immunity has played an important role in the reverse war on terror litigation. An important question has been the clarity with which the plaintiff’s asserted rights were established at the time of violation.

202. *Id.* at 744–45 (quoting *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896) (citations omitted)).

203. *See, e.g.,* *CHEMERINSKY*, *supra* note 195, at 534–37.

204. *Id.*

205. *Pearson v. Callahan*, 129 S. Ct. 808, 815–16 (2009) (citations omitted) (citing *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

206. 129 S. Ct. 808 (2009).

207. *Id.* at 821.

208. *See id.* at 819 (discussing role of first step).

209. *Mitchell v. Forsyth*, 472 U.S. 511, 525–26 (1985).

210. *See, e.g.,* *Nixon v. Fitzgerald*, 457 U.S. 731, 741–44 (1982) (discussing doctrine in context of absolute immunity).

Plaintiffs will often win this battle. In *Iqbal v. Hasty*,²¹¹ a classic conditions of confinement case, the Second Circuit remarked:

[T]he exigent circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches. This and other rights, such as the right to be free from use of excessive force and not to be subjected to ethnic or religious discrimination, were all clearly established prior to 9/11²¹²

There may be rights, viewed as more at the margin, that were not clearly established at the relevant time.²¹³ The *Pearson* rule, permitting omission of the inquiry as to whether a right exists at all, may slow clarification of the existence of rights. For noncitizens complaining of conduct outside the United States, the major immunity question will be whether they possessed *any* constitutional rights and whether defendants could have reasonably foreseen that they did.

If we assume that most of the suits under discussion here will be brought against Bush-era officials for actions outside the United States, a number of claims will be barred by qualified immunity. Of course, the *Boumediene* rule might be extended to rights beyond habeas corpus and the areas beyond Guantanamo.²¹⁴ These developments would raise, in the immunity context, the question of whether defendants should have foreseen the rights despite the District of Columbia Circuit's view in *Rasul* that they could not.²¹⁵ The Ninth Circuit has required a high degree of foresight on the defendant official's part, even though there were no decisions squarely on point that would invalidate his conduct.²¹⁶ In *Al-Kidd v. Ashcroft*,²¹⁷ the court noted the presence of dicta, decisions on analogous issues, and the point that "the history and purposes of the Fourth Amendment were known well before 2003."²¹⁸ Still, an important goal of qualified immunity is that officials—whose zeal the system wants to encourage—should not have to guess about the existence of rights. *Rasul* will probably be followed by other courts, permitting numerous assertions of qualified immunity in suits by aliens based on conduct outside the

211. 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

212. *Hasty*, 490 F.3d at 159–60.

213. *Id.* at 167–68 (procedural due process rights prior to prison administrative segregation).

214. *See* *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 208–09 (D.D.C. 2009) (extending *Boumediene* rule to Bagram Airfield, Afghanistan), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

215. *Rasul II*, 563 F.3d 527, 530 (D.C. Cir. 2009) ("No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights."), *cert. denied*, 130 S. Ct. 1013 (2009).

216. *See* *Al-Kidd v. Ashcroft*, 580 F.3d 949, 970 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

217. *Id.*

218. *Id.* at 970–71.

United States. In the domestic war on terror context, *Rasul*'s utility to defendant officials is less clear. John Yoo has said that it is of little value.²¹⁹ Thus, qualified immunity may be less of a problem for some plaintiffs than cause of action issues.

Of course, the war on terror could cause the domestic rules to change. This is certainly a context in which we want officials to act with zeal. Front-line officers may have to make split-second decisions that could affect thousands of lives. Higher-level officials may have to formulate policies that run up against constitutional protections in order to adequately investigate the terror threat.²²⁰ Thus, officials at all levels need freedom to act. Even if current suits are only against Bush administration officials, the law must seek to develop immunity doctrines that protect future administrations as well. One of the rationales for immunity is the importance of attracting individuals to government service without their having to fear a constant barrage of suits for doing their duty.²²¹ Moreover, given the war on terror, federal officials may have a special need for immunity that their state and local counterparts lack. Immunity is a judge-made doctrine, heavily driven by concerns of public policy.²²² The big question is whether the Court might formulate special rules for federal officials engaged in the war on terror.

Any such effort to change the rules would be a step toward bifurcating federal level immunity from that enjoyed by state and local officials. As such, it would run counter to one of the fundamental tenets of immunity law: that it is the same for federal and state officials. In *Butz v. Economou*,²²³ the Supreme Court declared categorically that "we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."²²⁴ The Court noted that prior precedent had treated the two questions as interchangeable and concluded that the immunity inquiry in both contexts should be guided by the same policy considerations.²²⁵ In an excellent recent article on *Bivens*, Professor James Pfander and his co-author David Baltmanis reinforce the *Butz* parallelism in the following terms: persons who seek recourse from the courts for violations of their rights by public officials should not encounter different doctrines of immunity depending on the happenstance of the level of government for which the official works.²²⁶

219. John Yoo, *Terrorist Tort Travesty*, WALL ST. J., Jan. 19, 2008, at A13.

220. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (emphasizing importance of freeing from litigation officials who are responding to a national security emergency).

221. *Id.*

222. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 744–45 (1982).

223. 438 U.S. 478 (1978).

224. *Id.* at 504.

225. *Id.* at 503–04.

226. James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 124–25 (2009).

Things may not be so clear, however. *Butz* was a 5–4 decision.²²⁷ Four Justices sharply disagreed with the majority and advocated “differing standards of immunity.”²²⁸ For Justice William Rehnquist, “even a moment’s reflection on the nature of the *Bivens*-type action and the purposes of § 1983, as made abundantly clear in this Court’s prior cases, supplies a compelling reason for distinguishing between the two different situations.”²²⁹ He emphasized Congress’s waiver of sovereign immunity in the FTCA and argued that the federal government has greater supervisory power over its own officials than it does over state officials.²³⁰ On a conceptual level, different treatment of the immunity question might be warranted by the fact that § 1983 is a statutory cause of action while *Bivens*—the principal source of suits in which federal immunity issues will arise—is entirely judge-made. Certainly, the Court has looked to the history and purpose of § 1983 to resolve issues of state and local immunity.²³¹ And with respect to the availability of *Bivens* actions, it has developed a significant doctrine of limitation—special factors counseling hesitation—not present in the § 1983 context. It is true, despite these arguments, that any move away from parallelism would be a big step. But the full effects of the war on terror on the judicial role and judicial doctrines remain to be seen.

If courts are willing to take this step, what might immunity doctrine look like? One can find the suggestion that absolute immunity is appropriate in the national security context.²³² However, *Mitchell v. Forsyth*²³³ appears to have put an end to this possibility. Although the *Mitchell* Court was split in numerous ways, there seems little possibility of a reconsideration of the prevailing opinion’s view that “[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.”²³⁴ The question will become how to apply the current framework for qualified immunity to the special circumstances of the war on terror. The current focus is on the defendant’s knowledge of the plaintiff’s rights. In his book *Not a Suicide Pact*,²³⁵ Judge Richard Posner considers the question of “how far civil liberties based on the Constitution should be permitted to vary with the threat level.”²³⁶

227. Justice Byron White authored the majority opinion. *Butz*, 438 U.S. at 480.

228. *Id.* at 525 (Rehnquist, J., dissenting).

229. *Id.*

230. *Id.* at 524–25.

231. *See, e.g.,* *Pierson v. Ray*, 386 U.S. 547, 554 (1967). *But see Butz*, 438 U.S. at 501–02 (majority opinion) (questioning emphasis on legislative creation of cause of action in determining immunity).

232. *See Mitchell v. Forsyth*, 472 U.S. 511, 538, 540–42 (1985) (Stevens, J., concurring).

233. 472 U.S. 511 (1985).

234. *Id.* at 523 (majority opinion).

235. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

236. *Id.* at 7.

Posner advocates a balancing approach to determine the scope of constitutional rights in emergency circumstances.²³⁷ Building on Posner, a defendant official could argue that the emergency circumstances of the war on terror rendered the plaintiff's rights less "clearly established" than they would have been in normal times.

An argument along these lines was advanced in the first *Iqbal* appeal to the Second Circuit.²³⁸ On the issue of qualified immunity, some defendants argued that "the post-9/11 context requires a different outcome."²³⁹ They contended that "even if the law was clearly established as to the existence of a right claimed to have been violated, it was not clearly established in the extraordinary circumstances of the 9/11 attack and its aftermath."²⁴⁰ As noted, the court rejected the argument both on the ground that the rights were clearly established and on the ground that they "do not vary with the surrounding circumstances."²⁴¹ Later in the Article, I will address the issue of whether arguments of this sort can be put forward as substantive defenses.²⁴² I raise the point here both to underscore how closely entangled immunity and merits issues can become and to note how defendants may piggyback merits issues onto immunity denial appeals. John Yoo may be right, for now, on the limited value of immunity. Still, defendants will win some cases.²⁴³ Collateral appeals of immunity denials—coupled with possible piggybacking of other issues²⁴⁴—could lead to long delays. And, of course, given the uncertain reach of *Boumediene*, it seems almost certain that Bush administration officials can claim immunity with respect to claims by aliens based on actions arising outside the United States. In sum, immunity is not a toothless tiger. It represents one more limit to the availability of reverse war on terror suits.

3. The Shadow of *Iqbal*—Pleading, Supervisory Liability, and Immunity Reinforced

Its 2009 decision in *Ashcroft v. Iqbal*²⁴⁵ is widely regarded as one of the Supreme Court's most important rulings on pleading requirements under the Federal Rules of Civil Procedure.²⁴⁶ Its importance extends well

237. *Id.* at 9, 31, 35, 41.

238. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

239. *Hasty*, 490 F.3d at 159.

240. *Id.*

241. *Id.* at 159–60.

242. *See infra* Part III.C.3.

243. *E.g.*, *Rasul II*, 563 F.3d 527, 532–33 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

244. *See Mitchell v. Forsyth*, 472 U.S. 511, 548–49 (1985) (Brennan, J., dissenting) (criticizing the Court's "toothless" standard regarding issues that can be raised on interlocutory appeals of immunity denials).

245. 129 S. Ct. 1937 (2009).

246. *See, e.g.*, Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*,

beyond pleading, particularly for the civil suits discussed in this Article. *Iqbal* was a reverse war on terror *Bivens* action. The plaintiff claimed that after the September 11 attacks, federal officials adopted a policy of highly restrictive detention of Arab Muslim men. Having been detained pursuant to this policy, the plaintiff further alleged mistreatment of various sorts including physical harm and interference with religious practices.²⁴⁷ He sued both the high-level officials responsible for this policy and the lower-level officials who carried it out.²⁴⁸ He asserted constitutional claims under *Bivens* and statutory claims of the sort discussed above,²⁴⁹ most of which were dismissed.²⁵⁰ The case came before the Second Circuit on appeal from a denial of a claim for qualified immunity. The appeals court cast the immunity claim in the following terms:

[The] arguments with respect to qualified immunity fall into several broad categories: (1) the Plaintiff's allegations do not allege the violation of a clearly established right, (2) do not allege sufficient personal involvement of the Defendants in the challenged actions, (3) are too conclusory to overcome a qualified immunity defense, and (4) the Defendants' actions were objectively reasonable. Permeating the Defendants' assertion of a qualified immunity defense is the contention that, however the defense might be adjudicated in normal circumstances, the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.²⁵¹

It denied virtually all of the immunity claims.²⁵² At issue before the Supreme Court were the immunity claims of two high ranking officials—former Attorney General John Ashcroft and FBI Director Robert Mueller.²⁵³

The Court reversed the denials.²⁵⁴ Central to its resolution of the issue was its understanding of the concept of supervisory liability. Plaintiff did not allege that Ashcroft and Mueller confiscated his Koran. But he did allege that they formulated the policies that permitted the abuses, knew of

N.Y. TIMES, July 21, 2009, at A10 (calling *Iqbal* “[t]he most consequential decision of the Supreme Court’s last term”).

247. See *Iqbal*, 129 S. Ct. at 1943–44 (outlining allegations).

248. The Supreme Court decision dealt only with two high-level officials: the Attorney General and the Director of the FBI. *Id.* at 1942.

249. See *supra* Part III.C.1.

250. *Iqbal v. Hasty*, 490 F.3d 143, 150–01 (2d Cir. 2007) (summarizing the litigation in the district court), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

251. *Id.* at 151.

252. *Id.* at 168–77.

253. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

254. *Id.* at 1943. The opinion focuses more on pleading and related issues than on the merits of each individual claim. See *id.* at 1942–43.

and condoned the policies, and acted because of the race, religion, and/or national origin of the plaintiff and his fellow detainees.²⁵⁵ The Court treated the case generally as raising a claim of unconstitutional discrimination.²⁵⁶ It saw the problem as essentially one of supervisory liability: did the plaintiff adequately claim discrimination by *these* officials, or was he attempting to hold them liable for the acts of subordinates?²⁵⁷ If the latter, any such claim would run into the well-established doctrine that “[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.”²⁵⁸

The majority held that the plaintiff had failed to meet the requirement that he “plead that each [g]overnment-official defendant, through the official’s own individual actions, has violated the Constitution.”²⁵⁹ What is unclear is whether this is a holding about supervisory liability in the discrimination context or in every context. The majority opinion can be read both ways. At times, it focuses on the apparent contention that a supervisor’s knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.²⁶⁰ But the majority is also more categorical: “In a . . . *Bivens* action—where masters do not answer for the torts of their servants—the term ‘supervisory liability’ is a misnomer.”²⁶¹

The last sentence appears to remove supervisory liability from *Bivens* actions. The dissent read the opinion this way. According to Justice David Souter, “the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.”²⁶² If accurate, this broad reading may pose serious problems for plaintiffs suing policy makers over their individual grievances and for the utility of the civil suit as an accountability mechanism in examining policies. Plaintiffs would presumably have to show not just that a policy led to unconstitutional results, but also that such results were one of its goals. It may be that, outside the discrimination context, plaintiffs challenging policies such as extraordinary rendition can make this showing. However, defendants will certainly try to separate the consequences of a policy from the policy itself. Much will depend on the attitude of lower courts. In *Al-Kidd v. Ashcroft*,²⁶³ decided after *Iqbal*, the Ninth Circuit offered the following analysis:

255. *Id.* at 1954–55 (Souter, J., dissenting).

256. *Id.* at 1947 (majority opinion).

257. *Id.* at 1949.

258. *Id.* at 1948.

259. *Id.*

260. *Id.* at 1950–52. The Court stated that “[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.” *Id.* at 1948.

261. *Id.* at 1949.

262. *Id.* at 1957 (Souter, J., dissenting).

263. 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

Al-Kidd's complaint does not allege that Ashcroft was directly involved in the decision to detain al-Kidd. But "direct, personal participation is not necessary to establish liability for a constitutional violation." Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others."²⁶⁴

Not all plaintiffs may be so fortunate.

Given the uncertain standard for substantive liability, the question arises as to what a plaintiff must plead in order to survive a motion to dismiss a claim. The pleading issue is regarded as the central point of *Iqbal*.²⁶⁵ It has been widely discussed elsewhere;²⁶⁶ I will discuss it briefly here. The Court put forward a distinction between pleadings that "are no more than conclusions,"²⁶⁷—and thus not entitled to the assumption of truth—and "well-pleaded factual allegations [that might] plausibly give rise to an entitlement to relief."²⁶⁸ Statements that at least implicitly contain legal conclusions run the risk of falling into the former category.²⁶⁹ Thus, *Iqbal*'s use of terms like "willfully and maliciously," "solely on account of his religion," etc.,²⁷⁰ appeared to the majority to be nothing more than the "formulaic recitation" of a legal claim.²⁷¹ The complaint did allege facts such as intentionally adopting "restrictive conditions of confinement."²⁷² However, the Court reasoned that the more "plausible" explanation for this conduct was a legitimate, penological one.²⁷³

It will take lower courts some time to sort out the pleading implications of *Iqbal*. However, it is apparent that plaintiffs who have not yet had the

264. *Id.* at 965 (citations omitted) (citing *Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004); *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991)).

265. See, e.g., *The Supreme Court, 2008 Term: Leading Cases*, 123 HARV. L. REV. 153, 252–53 (2009) (discussing importance of *Iqbal* and impact on pleading stage of litigation).

266. E.g., Recent Case, *D.C. Circuit Quashes Subpoenas for Congressman's Testimony to the House Ethics Committee*.—In re Grand Jury Subpoenas, 571 F.3d 1200 (D.C. Cir. 2009), 123 HARV. L. REV. 564, 586–87 (2009) (discussing impact of *Iqbal* on international human rights litigation).

267. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

268. *Id.*

269. See *id.*

270. *Id.* at 1951.

271. *Id.*

272. *Id.*

273. *Id.* at 1951–52.

benefit of discovery will face a challenge in crafting complaints that satisfy the Court's more stringent reading of Rule 8. The most likely response is highly detailed pleadings, with as much "factual" material as possible. Such a development might seem little more than a departure from the spirit of the Rules. However, the *Iqbal* Court indicated a willingness to take a complaint and decide more than just its sufficiency as a device to get the case started. The plausibility standard gives the defendant the opportunity to argue its case at the pleading stage, with the burden apparently on the plaintiff.²⁷⁴ However *Iqbal* plays out in the lower courts, it has the potential to make things harder for plaintiffs in reverse war on terror suits. It is no coincidence that *Iqbal* itself was such a suit.

Iqbal was the first reverse war on terror suit decided by the Court in which the plaintiff sought damages instead of habeas corpus.²⁷⁵ In fact, *Iqbal* emerges, totally apart from its significance as a pleading case, as an important contribution to the doctrine of official immunity from damages suits. During the same term, in *Pearson v. Callahan*, the Court re-emphasized the importance of qualified immunity as "an immunity from suit rather than a mere defense to liability."²⁷⁶ *Iqbal* makes clear the majority's concern for the qualified immunity defense when officials are responding to "a national and international security emergency unprecedented in the history of the American Republic."²⁷⁷ Particularly significant is the Court's receptivity to the breadth of the defendants' collateral appeal of the denial of their qualified immunity defense, including their attack on the sufficiency of the complaint's statement of a cause of action.²⁷⁸ The plaintiff argued that the defendants had presented "a qualified immunity appeal based solely on the complaint's failure to state a claim and not on the ultimate issues relevant to the qualified immunity defense itself."²⁷⁹ The majority, however, was unwilling to separate the issue of the clearly established nature of the plaintiff's rights from the issue of whether he had sufficiently alleged that the defendants had violated them. The latter issue might be viewed as raising points closer to the merits—an "I didn't do it" defense—but the Court saw the two as

274. See *The Supreme Court, 2008 Term: Leading Cases*, *supra* note 265, at 261 (contending that *Iqbal* changes plausibility standard into a probability one).

275. The high profile cases from *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to *Boumediene v. Bush*, 553 U.S. 723 (2008), all arose out of petitions for habeas corpus. So far this term, the Court has issued an opinion in a case testing a major anti-terrorist criminal statute. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (holding statute to be constitutional as applied to petitioners). It has denied certiorari in private damages suits of the sort under discussion here. See *Rasul II*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010), but has granted certiorari in *Al-Kidd*.

276. 129 S. Ct. 808, 815 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

277. *Iqbal*, 129 S. Ct. at 1953 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

278. See *id.* at 1945–47 (discussing applicability of doctrine).

279. *Id.* at 1946.

“inextricably intertwined.”²⁸⁰ Indeed, the Court went further, reading *Wilkie v. Robbins*²⁸¹ as precedent for considering *Bivens* cause of action issues on an appeal from a denial of qualified immunity.²⁸² This approach makes sense if one views immunity broadly as a right not to face trial and discovery for accusations that are baseless or cannot serve as the basis of recovery. One can thus find in *Iqbal* a heightened pleading rule, a restrictive approach to supervisory liability, and a renewed emphasis on qualified immunity. The war on terror appears to have driven the Court’s analysis on all three points, and reverse war on terror plaintiffs may encounter each or all of them.

4. The State Secrets Privilege

A plaintiff might successfully navigate all these threshold obstacles and still not reach the merits. A significant obstacle, particularly in suits involving the war on terror, is the state secrets privilege.²⁸³ “Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if ‘there is a reasonable danger’ that such disclosure ‘will expose military matters which, in the interest of national security, should not be divulged.’”²⁸⁴ Building on the concept of “military,” both the Bush and Obama administrations have invoked the privilege in suits involving such war on terror matters as extraordinary rendition.²⁸⁵ Critics have long argued that the privilege runs counter to the legal system’s provision of relief through constitutional tort actions and, indeed, to *Marbury* itself.²⁸⁶ As Professor Robert Chesney puts it, “concerns for democratic accountability are especially acute when the privilege is asserted in the face of allegations of unconstitutional government conduct.”²⁸⁷ Courts differ over the extent to which the privilege operates to exclude evidence as opposed to the extent to which it operates as a rule of non-justiciability with respect to the entire subject matter of a particular suit.²⁸⁸ In *Mohamed v. Jeppesen Dataplan, Inc.*,²⁸⁹ a

280. *Id.* (quoting *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 51 (1995)).

281. 551 U.S. 537 (2007).

282. *Iqbal*, 129 S. Ct. at 1946. *But see* *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (reaffirming general narrowness of collateral order doctrine).

283. *See, e.g.*, Editorial, *supra* note 124 (criticizing Bush administration’s extensive use of privilege in war on terror civil suits).

284. *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

285. *See* Editorial, *supra* note 50 (criticizing both administrations).

286. *Cf.* Amanda Frost, Essay, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1962–63 (2007) (discussing *Marbury* within the context of the state secret privilege).

287. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 *GEO. WASH. L. REV.* 1249, 1252–53 (2007).

288. *See* *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007) (discussing different approaches taken by courts).

289. 563 F.3d 992 (9th Cir. 2009), *rev’d en banc*, 614 F.3d 1070 (9th Cir. 2010).

panel of the Ninth Circuit narrowed considerably the “very subject matter” concept and emphasized the role of the privilege with respect to specific evidentiary questions.²⁹⁰ The court expressed both separation of powers concerns about preserving the judiciary’s role and concern for the individual rights of those asserting harm from government action. However, on September 8, 2010, the Ninth Circuit, sitting en banc, overruled the panel. The en banc majority viewed the case as one in which the claims were so “infused” with state secrets that any effort to defend against them “would create an unjustifiable risk” of revealing them.²⁹¹ Even under a restrictive view, however, the state secret scales are heavily weighted in the government’s favor. Exclusion of a single piece of evidence can force dismissal of a suit. It may make it impossible for the plaintiff to prove his claim,²⁹² negate the defendant’s ability to mount a defense,²⁹³ or negate the plaintiff’s ability to demonstrate standing to proceed.²⁹⁴ Moreover, while courts purport to “balance,”²⁹⁵ the weighing process is limited. It is, at most, a partial balancing. It would seem that the greater the plaintiff’s need for the evidence, the more reluctant the court should be to find that the privilege attaches.²⁹⁶ However, “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that” the privilege applies.²⁹⁷ Deference to the executive plays a role, of course, even if the court has exercised its authority to consider the matter in camera.²⁹⁸ Even if the government loses its claim of privilege, interlocutory review may be available.²⁹⁹

At the moment, the privilege is the object of considerable attention, in large part because of the role it plays in war on terror litigation. Legislation to restrict its use has been proposed.³⁰⁰ The executive branch has promulgated limiting policies and procedures³⁰¹ but continues to invoke the privilege.³⁰² It is likely that the privilege will remain a significant factor in reverse war on terror litigation, although one must recognize that shifting attitudes toward the privilege could foreshadow a general pro-

290. *Id.* at 1003–04.

291. *Mohamed v. Jeppesen Dataplan, Inc.* 614 F.3d 1070, 1088, 1093 (9th Cir. 2010) (en banc).

292. *Cf. Mohamed*, 563 F.3d at 1001.

293. *Cf. id.*

294. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007).

295. *E.g., Mohamed*, 563 F.3d at 1003.

296. *See United States v. Reynolds*, 345 U.S. 1, 11 (1953).

297. *Id.*

298. *Al-Haramain*, 507 F.3d at 1203.

299. *Cf. id.* at 1196 (noting that “[t]he district court [*sua sponte*] certified order for interlocutory appeal” by plaintiff).

300. *See generally* State Secrets Protection Act, S. 417, 111th Cong. (2009).

301. *See* Memorandum from Eric Holder, Att’y Gen., to the Heads of Exec. Dep’ts & Agencies, Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

302. *See, e.g.,* Editorial, *supra* note 50.

plaintiff shift.

5. The Merits

Although much of this Article's focus is on threshold obstacles, it is important to consider what might happen down the road. The fact that a suit gets past all the problems listed above and makes it to the merits stage is no guarantee that it can serve as a full-scale accountability mechanism. The government might, for example, make a strategic decision to settle.³⁰³ The key question is the extent to which the suit will serve the evaluative component of accountability through having the judiciary "say what the law is."³⁰⁴ Suppose the judge's rulings on all motions are favorable to the plaintiff and that any collateral appeals—of an immunity denial, for example—go his way. Suppose further that the judge's instructions to the jury reflect the plaintiff's view of the law. What is the end result if the jury returns a verdict for the defendant? The plaintiff has nothing to appeal. The appellate court will never get a chance to say what the law is with respect to the underlying legal claim beyond what it may have said about immunity and related issues. Some "law" will be made at this stage.³⁰⁵ Law will also be made, particularly on motions to dismiss, at the district court level. But the result is a piecemeal approach to accountability—within any one lawsuit—particularly if the defendant official wins and can claim vindication for his actions and the policies they represent. As for accountability resulting from the potential number of suits, the likelihood of widely differing results undercuts the goal of uniformity that seems implicit in the notion of accountability as a guide to future action.

The notion of plaintiffs losing is not fanciful. Any group of lawsuits will produce a mix of winners and losers. The reverse war on terror suit seems likely to produce more of the latter. *Bivens* actions in particular are regarded as usually ending in defeat for the plaintiff.³⁰⁶ Reverse war on terror suits may produce a strong combination of attractive defendants—officials who were protecting the country, perhaps overzealously—and, frequently, unattractive plaintiffs.

For those who see the civil suit as an opportunity to bring the Bush

303. See *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 121 (D.D.C. 2005). The government settled Hatfill's case. See Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. TIMES, June 28, 2008, at A1.

304. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

305. Professor Aziz Huq refers to "policy arbitrage through procedural manipulation." Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 234 n.40.

306. See, e.g., Zaring, *supra* note 71, at 319 ("[T]he Supreme Court . . . has been almost uniformly hostile to would-be plaintiffs since 1982."). But see Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (contending that *Bivens* actions succeed more frequently than is generally assumed). The question on which I am focusing is the extension of *Bivens* availability to claims that might be viewed as novel, as opposed to the more frequent suit arising out of prison or police contexts.

administration to the heel of judicial accountability, the merits pose an additional risk: judgment for the defendants might include an element of judicial *justification* of their acts. Let us assume a suit in which the plaintiff makes a strong case that he possessed a constitutional right (or rights) that was violated and in which the defendant does not contest the facts. It is still open to the defendant to argue that he was entitled to violate the right. In *Iqbal*, some defendants advanced the argument that “even if the law was clearly established as to the existence of a right claimed to have been violated, it was not clearly established in the extraordinary circumstances of the 9/11 attack and its aftermath.”³⁰⁷ This argument, advanced as a claim of immunity, may be based on Judge Posner’s concept of varying constitutional rights.³⁰⁸ It is possible that courts will be receptive to the concept of rights that diminish in the context of the war on terror. It is also possible that courts will consider favorably the argument that this context gives defendant officials greater authority to infringe whatever rights the plaintiffs possessed. Although unsuccessful, the *Iqbal* defendants argued that “the Government was entitled to take certain actions that might not have been lawful before 9/11 because the Government’s interests assumed special weight in the post-9/11 context.”³⁰⁹ The Bush Justice Department discussed these concepts extensively in evaluating possible prosecutions of officials for torture.³¹⁰ An Office of Legal Counsel (OLC) memorandum emphasized the public policy concerns that underlie the defenses of “necessity” and “self-defense.”³¹¹ For example, the OLC stated its belief “that a claim by an individual of the defense of *another* would be . . . supported by the fact that, in this case, the nation is under attack and has the right to self-defense.”³¹² The OLC analysis has been criticized.³¹³ More importantly, it is not clear how these concepts derived from the criminal law would apply to civil suits. But suppose there is some judicial endorsement of either defense. A court has spoken; evaluation has taken place. This seems a perfectly acceptable result if accountability is viewed as a two-way street.

In sum, the civil suit emerges as a possible accountability mechanism. It is perhaps closer to the retributive model than to the inquiry model, but it does bring into play the impartiality and legitimacy of the judicial system.

307. *Iqbal v. Hasty*, 490 F.3d 143, 159 (2d Cir. 2007) *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

308. See *supra* text accompanying notes 235–37.

309. *Iqbal*, 490 F.3d at 159.

310. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), in *THE TORTURE MEMOS* 41, 90–99 (David Cole ed., 2009).

311. *Id.*

312. *Id.* at 97 (emphasis added).

313. See, e.g., *THE TORTURE MEMOS*, *supra* note 185, at 23–24. But see Pines, *supra* note 33, at 143–53 (defending practice of Attorney General opinions and reliance thereon as a defense to criminal and civil suits).

It can be seen as a default version of the commission model. Moreover, as far as involving the judicial system is concerned, the civil damages suit is the only game in town. Injunctive actions and prosecutions each face numerous hurdles,³¹⁴ and are unlikely to play a significant role as accountability mechanisms. At the same time, the civil tort suit faces serious problems as well. This Article thus turns to the obvious next question: given the fact that war on terror civil suits do not constitute a radical new species of litigation, and given their potential to serve as accountability mechanisms, why does the legal system throw so many obstacles in their paths?

IV. WHAT EXPLAINS THE SYSTEMIC RESISTANCE TO REVERSE WAR ON TERROR ACTIONS?

A. *General Considerations*

The civil suit (usually a *Bivens* action) seems well-positioned to play the role of accountability mechanism. It can contribute to all four stages of accountability: informing; justification; evaluation; and rectification, defined as compensation, sanctions, and deterrence/guidance.³¹⁵ The notion of important public law decisions being made through adjudication is hardly a novel one. Yet, the legal system makes reverse war on terror suits extraordinarily difficult to bring. As the Second Circuit put it: “Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for . . . damages . . . is not one of them.”³¹⁶ In this Part, I examine why, and I consider two possible explanations. The first—developed in section B—is what might be labeled as “institutional concerns.” The notion here is that the limits of the tort suit make such actions unsuitable vehicles for the broad policy determinations that accountability seems to require, especially when those decisions are cast in constitutional stone. The analysis considers arguments on both sides and concludes that the institutional arguments against the tort suit have some weight but are hardly dispositive. Section C argues that the crucial variable is that the suits under consideration involve the war on terror. Concerns about the role of the judiciary in national security become central. Deference to the political branches becomes, in effect, a “special factor counseling hesitation” in a general sense.

B. *Their Finest Hour—the “Public Law” Litigation and its Bearing on Tort Suits*

Injunctive relief, particularly against Bush administration officials, is

314. See *supra* notes 32–33 and accompanying text.

315. See *supra* notes 56–63 and accompanying text.

316. *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009).

largely unavailable to war on terror plaintiffs attacking policies. Yet, paradoxically, the notion of courts as accountability mechanisms derives much of its force from a form of injunctive action that played a central role in late 20th Century debates about the role of courts in America—the institutional reform or “public law” litigation made famous by Professor Abram Chayes.³¹⁷ Chayes focused on litigation aimed at a wide variety of governmental practices,³¹⁸ and he insisted that “[w]e are witnessing the emergence of a new model of civil litigation.”³¹⁹ Salient characteristics of this new model included the increasing importance of equitable relief, a strong judicial effect on future events, awareness of the policy functions of litigation and its impact on persons not before the court, a willingness to engage in the sort of broad fact-finding engaged in by legislatures, and the central role of the judicial decree.³²⁰ Indeed, the suits were portrayed as giving access to political power to those who lacked it.³²¹

A major theme of the proponents of this litigation, such as Chayes and Professor Owen Fiss,³²² was their attempt to legitimize a broad societal role for the courts—one that is central to any attempt to use them as accountability mechanisms, whatever form the action may take. Chayes found legitimacy in “the ability of a judicial pronouncement to sustain itself” in a continuous dialogue with “other political elements,” including “the press and wider publics.”³²³ Within this dialogue, “judicial action [could] only achieve[] . . . legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.”³²⁴ The public law-suits of the late 20th Century were thus direct descendants of *Marbury*.³²⁵ Scholarly interest in these suits continues.³²⁶

Current attempts to use the courts as war on terror accountability mechanisms draw on the public law model as a source of legitimacy. David Zaring states that “[t]he high profile policy-directed tort suit[s]” are “in some ways inheriting the mantle of institutional reform litigation.”³²⁷ They

317. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 *passim* (1976).

318. See *id.* at 1284.

319. *Id.* at 1282.

320. See *id.* at 1292–1302.

321. See *id.* at 1315.

322. See Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979) (“The function of a judge is to give concrete meaning and application to our constitutional values.”).

323. Chayes, *supra* note 317, at 1316.

324. *Id.*

325. See *id.* (contrasting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), with *Lochner v. New York*, 198 U.S. 45 (1905)).

326. See generally Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (discussing various analyses regarding deterrent effects of civil litigation on government officials and contending that access to useful information about suits should play a central role).

327. Zaring, *supra* note 71, at 338–39.

become almost “an alternative form of administration as well. The suits certainly seek to constrain government officials, and if they do not often succeed in that, they do garner attention, which may, ultimately, generate political coalitions to provide the relief that doctrine does not.”³²⁸ The suits in question may be tort actions, but their scope is often broader than any defendant or group of defendants. As Professor Amar points out, “[p]ervasive and systematic illegality will not always be traceable to specific individuals who can be called to account.”³²⁹

The mantle only extends so far, however. Tort suits are quite different from equitable actions in such key matters as fact-finding, retrospective as opposed to prospective relief, range of participation, and remedial powers of the trial judge. Another important difference is that the public law actions drew much of their legitimacy from the fact that federal judicial power was exercised largely over state and local institutions. The Fourteenth Amendment provides direct support for supervision of these institutions. Even in this context, the Court expressed reservations about ongoing federal judicial control over state military (National Guard) actions.³³⁰ On the other hand, federal judges may feel a “special political vulnerability”³³¹ when asked to oversee, even indirectly, policies and activities of their co-ordinate branches.

There are obviously other limits to the role that individual tort suits can play as forums about national policy. Consider the following observations by a congressional committee, as quoted by a federal court:

“[T]he development of the law regulating electronic surveillance for national security purposes has been uneven and inconclusive. This is to be expected where the development is left to the judicial branch in an area where cases do not regularly come before it. Moreover, the development of standards and restrictions by the judiciary with respect to electronic surveillance for foreign intelligence purposes accomplished through case law threatens both civil liberties and the national security because that development occurs generally in ignorance of the facts, circumstances, and techniques of foreign intelligence electronic surveillance not present in the particular case before the court.

. . . [T]he tiny window to this area which a particular case affords provides inadequate light by which judges may be relied upon to develop case law which adequately balances the rights of privacy and national security.”³³²

328. *Id.* at 339.

329. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1487 (1987).

330. See *Gilligan v. Morgan*, 413 U.S. 1, 5–10 (1973).

331. Amar, *supra* note 329, at 1508.

332. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1119–20

These concerns are not limited to the field of national security. The tort suit does not usually examine generalized manifestations of a phenomenon. It is restricted to a particular claim and defenses to it. Parties do not engage in a broad-ranging search for truth; they strive to convince the fact-finder of a particular narrative, to discredit alternative versions, and to exclude evidence that does not support their views. Trial courts do not have the fact-finding resources of a legislature. Moreover, the central role of the jury introduces a wild card. The equity courts at the center of the public law model utilize a more “polycentric” party structure than the adversarial model and can benefit from broader fact-finding capabilities. The contrast with the commission model is even sharper. Commissions such as the 9/11 Commission have a broad mandate and broad leeway in getting there. They are not party driven, encumbered by rules of evidence, or necessarily limited to highly fact-specific determinations. In ideal form, they should lack the partisan nature that the adversarial quality of lawsuits could engender.

Nonetheless, I do not think that the aspects of the tort action discussed above—particularly the “tiny window critique”—necessarily disqualify it from playing an important role as an accountability mechanism. We have posited the goals of accountability to be the following: discovery and exposition of official conduct; explanation and justification by the officials; evaluation of the conduct’s legality by an authoritative source; and rectification, defined as compensation and the imposition of sanctions, if appropriate, norm articulation that will deter the particular officials if necessary, and provision of guidance for officials in the future.³³³ In terms of achieving these goals, a tort suit of the *Bivens* or similar variety that proceeds to the merits looks pretty good. The facts are aired and “found.” The official’s defense will almost certainly offer a justification. Judicial opinions, particularly at the appellate stage, will evaluate that defense. Compensation may be awarded. A successful suit will provide deterrence. The opinions, both on merits issues and on collateral matters such as immunity, will provide guidance.

An additional reason for viewing favorably the tort action as an accountability mechanism is the legitimacy factor. Federal court judgments are generally viewed as legitimate, particularly in the area of constitutional law,³³⁴ and *Bivens* actions are a form of constitutional adjudication. The legitimacy of any “judgment” about an aspect of the Bush administration’s anti-terrorism policies is an extremely important point. The subject is intensely controversial and political. If those who oppose the judgment can attack the institution that rendered it—say for being too political or too partisan—its ability to serve the broader goals of accountability is

(N.D. Cal. 2008) (quoting PERMANENT SELECT COMM. ON INTELLIGENCE, FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, H.R. REP. NO. 95-1283, pt. 1, at 21 (1978)).

333. See *supra* text accompanying notes 56–63.

334. Cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (discussing the “basic principle” of federal judicial supremacy in constitutional law).

compromised. I do not seek to somehow wish away objections to a substantial judicial role in national governance—questions such as the “counter-majoritarian” difficulty,³³⁵ for example. Indeed, such objections may be particularly acute in the national security area when the courts place themselves at odds with the political branches. One of the theses of this Article is that there are substantial reasons—referred to in shorthand form as deference and discussed in the next section—for courts not to do this. But that thesis does not rest on any notion of the courts’ illegitimacy as deciders of major public issues. Indeed, it is the very fact of their legitimacy that might lead one to accept their default role as accountability mechanisms to review Bush-era anti-terrorism policies.

Any discussion of the legitimacy of the tort suit as an accountability mechanism would be incomplete without a reference to Professor Lon Fuller’s analysis of courts as articulators of public values through the process of adjudication.³³⁶ Fuller’s views are sometimes presented as focused on a narrow “dispute resolution model” as opposed to the broader “public law model” discussed above.³³⁷ Professor Robert Bone has persuasively challenged this notion.³³⁸ For Bone, “Fuller viewed adjudication as a profoundly public institution with a vitally important social function. It was through the process of adjudication that reason was applied to the task of developing frameworks to order the ongoing process of human interaction, including the articulation of public norms.”³³⁹ For Fuller, the sharply focused adversary process permits the judge to see a problem from all relevant sides. He described the fact “of advocacy [as] not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man’s capacity for impartial judgment can attain its fullest realization.”³⁴⁰ Bone summarized “the core purpose of adjudication” as follows: “By focusing on actual disputes, the process of adjudication brought the abstract into productive relation with the concrete. Courts learned about the specifics of context at the same time as they reasoned about the implications of general principle.”³⁴¹

There are, however, three problems that stand in the way of a perfect fit between civil suits and the desire for accountability in the context of Bush era war on terror policies. The first is that the “tiny window” problem is particularly acute in suits that amount to constitutionally based attacks on

335. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

336. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363–65 (1978).

337. Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1274–75 (1995).

338. See *id.* at 1279–82.

339. *Id.* at 1282.

340. Fuller, *supra* note 336, at 384.

341. Bone, *supra* note 337, at 1305.

entire policies. No one suit can address an entire issue. Claims will arise out of specific “transaction[s] or occurrence[s].”³⁴² Thus, we see discrete suits concerning such matters as “extraordinary rendition,” conditions of confinement, the consequences of high-level legal advice, and alleged misuse of detention of material witnesses. These constitutional tort suits will raise—and decide—important constitutional questions as part of challenges to national policies. Yet, the matters at issue may not be representative of the general policy. It might be contended that a policy is essentially a method for dealing with a wide, unknown number of similar incidents and that a decision that evaluates one instance of treatment of a problem sheds light on the entire method. However, the incident giving rise to a particular claim may not be representative of the universe of potential incidents that generated the policy. Public interest lawyers, for example, may focus on egregious events in order to discredit an entire policy that, viewed in its entirety, serves important governmental interests. *Iqbal*’s generous treatment of the defendants’ motives in rounding up Muslim men³⁴³ seems to reflect a recognition that a discrete set of facts can obscure the reasons for a generalized course of action.

Moreover, the various policies that make up the war on terror, for which accountability is sought, have yielded a number of tort suits. They will proceed at different paces and yield conflicting results. It is hard to reconcile, for example, the Second Circuit’s finding of *Bivens* “special factors” in *Arar v. Ashcroft*³⁴⁴ with the California district court’s refusal to find them in *Padilla v. Yoo*.³⁴⁵ Rulings on the state secrets privilege will differ,³⁴⁶ as will those on supervisory liability.³⁴⁷ Some cases may actually go to trial; others may settle; others may be disposed of on non-merits grounds; others may fall by the wayside. The multiplicity of suits substantially weakens the goal of authoritative elaboration. It is not an answer to say that someday the Supreme Court will step in to provide answers. “Someday” could take years. If we want an accounting while the Bush era is still fresh in our memories, and if we want guidance about what to do about terrorism now, civil suits may not be the answer.

A second problem is that, despite the arguments advanced by Fuller and others, judges have frequently questioned the use of the tort suit as a vehicle to question broad governmental decisions. A well-known example

342. Cf. FED. R. CIV. P. 13(a).

343. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009).

344. 585 F.3d 559, 563–64 (2d Cir. 2009) (en banc).

345. 633 F. Supp. 2d 1005, 1025 (N.D. Cal. 2009) (denying motion to dismiss, with the exception of a single claim dismissed with leave to amend); see also Brown, *supra* note 16, at 880–81 (discussing different approaches in the two decisions).

346. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1000–01 (9th Cir. 2009) (discussing alternative approaches to privilege), *rev’d*, 579 F.3d 943 (9th Cir. 2009), and *aff’d en banc*, 614 F.3d 1070 (9th Cir. 2010).

347. The approach to supervisory liability found in *Al-Kidd v. Ashcroft*, 580 F.3d 949, 964–65 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98), seems at variance with the Supreme Court’s views on supervisory liability as stated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

is *United States v. Varig Airlines*,³⁴⁸ a statutory case involving the Federal Tort Claims Act, in which the Supreme Court cited Congress's desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."³⁴⁹ In *Schneider v. Kissinger*,³⁵⁰ a 2005 decision with a distinct war on terror flavor,³⁵¹ the District of Columbia Circuit declared that "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments."³⁵² Moreover, the court seemed willing to extend the shield of policy to the means of implementing it, at least where those means were implicit in the original policy.³⁵³ In the court's view, "[t]o determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication but of policymaking."³⁵⁴ Of course, in a constitutional tort suit, a policy and the means of executing it may blend into one claim, a possibility that the *Schneider* court seemed to foresee.³⁵⁵

In the constitutional context, opponents of the *Bivens* action have long expressed a preference for equitable relief and doubts about the basic concept of a "constitutional tort." Dissenting in *Carlson v. Green*,³⁵⁶ Justice Rehnquist noted the long-established "power of federal courts to grant equitable relief for constitutional violations," citing *Marbury* as an example.³⁵⁷

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private

348. 467 U.S. 797 (1984).

349. *Id.* at 814. The Court earlier pointed to legislative history in which a government official stated that "[i]t is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort." *Id.* at 809–10; *see also* *Dalehite v. United States*, 346 U.S. 15, 27 (1953).

350. 412 F.3d 190 (D.C. Cir. 2005).

351. The case involved claims arising out of a CIA effort to destabilize a socialist government in Chile. *Id.* at 191–92.

352. *Id.* at 197.

353. *See id.* at 198.

354. *Id.* at 197.

355. *Id.* at 197–98.

356. 446 U.S. 14 (1980).

357. *Id.* at 42 & n.8 (Rehnquist, J., dissenting).

claims.”³⁵⁸

These arguments bear some similarity to those of the original *Bivens* dissenters.³⁵⁹ Indeed, although the *Bivens* doctrine is still alive, the Supreme Court has engaged in a substantial retrenchment beginning in the 1980s.³⁶⁰ It is clear that the Court regarded several of these suits as directed at policy beyond merely presenting claims for redress of a distinct tort.³⁶¹

Justice Rehnquist returned to the subject in his dissent in *Butz v. Economou*.³⁶² He reiterated the point that *Marbury* “involved equitable-type relief by way of mandamus or injunction.”³⁶³ More importantly, he stressed:

[T]he threat of injunctive relief without the possibility of damages in the case of a Cabinet official is a better tailoring of the competing need to vindicate individual rights, on the one hand, and the equally vital need, on the other, that federal officials exercising discretion will be unafraid to take vigorous action to protect the public interest.³⁶⁴

The notion that tort suits play less of a role in vindicating the public interest resurfaced in *Nixon v. Fitzgerald*.³⁶⁵ The Court distinguished a “merely private suit for damages” from “an ongoing criminal prosecution” or an action to maintain the separation of powers.³⁶⁶ It is, of course, true that courts—particularly state courts—have long made governmental policy through the processes of the common law. Tort cases are a strong example. In the constitutional area, individual criminal cases are often the vehicles for important new rules.³⁶⁷ Outside that area, however, we are

358. *Id.* at 43 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)).

359. See Bandes, *supra* note 79, at 299–303 (comparing Rehnquist dissent with the *Bivens* dissents).

360. See Brown, *supra* note 16, at 858–61.

361. For example, the Court in *Bush v. Lucas*, 462 U.S. 367 (1983), cited “federal personnel policy.” *Id.* at 380–81. In *United States v. Stanley*, 483 U.S. 669 (1987), the Court stated that “congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.” *Id.* at 683.

362. 438 U.S. 478 (1978).

363. *Id.* at 523 (Rehnquist, J., dissenting). Indeed, the Court in *Boumediene* referred to habeas corpus as an equitable remedy. *Boumediene v. Bush*, 553 U.S. 723, 780 (2008). Referring to habeas corpus actions, Professor Huq argues that a development along these lines can be found in national security litigation when “de facto structural injunctions” lead to “significant change in national security programs,” although he notes that those bringing the actions may receive few benefits. Huq, *supra* note 305, at 248.

364. *Butz*, 438 U.S. at 524.

365. 457 U.S. 731 (1982).

366. *Id.* at 754 & n.37.

367. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a

used to constitutional law on such vital matters as desegregation, abortion, school prayer, and free speech being made primarily in equitable actions.³⁶⁸ It is not coincidental that the Supreme Court's retreat from *Bivens* began with cases aimed at the structure of governmental programs or underlying policies.³⁶⁹ A single tort decision can bring an entire national program to a halt. The core of the problem is whether one views constitutional tort suits as taking courts too far beyond their adjudicative function or whether one agrees with Professor Bandes' contention that "the courts' particularization function inevitably involves precedent setting and norm creation. The difference between decisions that bind discrete parties and those that bind large groups is a matter of degree, not of kind."³⁷⁰

A third institutional problem is that some reverse war on terror suits can be seen as political maneuvers in which political actors—seeking to perform the role of private attorneys general—utilize the tort system for purposes other than the resolution of disputes. Professor David Zaring has analyzed the "[c]onstitutional [t]ort [a]gainst [p]olicy."³⁷¹ He describes "high-profile cases [in which] winning the lawsuit is less precisely the point than is practicing increasingly personal politics while calling attention to a policy and a plight."³⁷² For Zaring, "[t]hese suits are more symbolic than likely to succeed, in that they rely not on the verdict, but on the ability to make a claim against a policy-maker."³⁷³

Professor Margulies views them as part of the "vast repertoire" of "crossover advocacy."³⁷⁴ This advocacy can include enlisting the media and foreign governments as well as academic scholarship and damages suits.³⁷⁵ Margulies also sees the potential political dimension. He characterizes Jose Padilla's suit against John Yoo as "[u]sing [l]itigation to

state court.").

368. See, e.g., *Roe v. Wade*, 410 U.S. 113, 120 (1973). The First Amendment area might be viewed as an exception, in that a substantial number of free speech cases have been criminal actions. E.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

369. See Brown, *supra* note 16, at 883.

370. Bandes, *supra* note 79, at 305 (footnotes omitted). Professor Huq advocates emphasis on remedies because "[i]t invites particular scrutiny of the question whether an individual judgment's effect rippled out to change larger institutional practices." Huq, *supra* note 305, at 234. His view of damage suits seems ambiguous. At one point he describes them as "a means to challenge isolated acts of abuse, but no avenue for effecting larger programmatic change." *Id.* at 243. But see *id.* at 252 (discussing view that constitutional tort litigation "limits future options by articulating new constitutional norms to constrain subsequent executives"). Tort suits may also present the risk of what Professor Margulies calls "hindsight bias." See Margulies, *supra* note 192, at 204 (describing hindsight bias as that which "makes every official mistake seem avoidable"). This article is an excellent overview of the role of *Bivens* actions in the national security context.

371. Zaring, *supra* note 71, at 331–39.

372. *Id.* at 332.

373. *Id.* at 335.

374. Margulies, *supra* note 74, at 348.

375. See *id.* at 364–72.

[s]ettle [i]deological [s]cores.”³⁷⁶

Of course, many controversial lawsuits can be criticized as “political,” including such staples as desegregation actions, challenges to legislative apportionment, and claims of politically motivated personnel actions. Similarly, the notion of the private attorney general is not new, although it is best known in the different context of congressional authorization of suits against private parties and governments, mainly at the state and local level.³⁷⁷ Like “political” lawsuits, it can be controversial. On the one hand, Professor Pamela Karlan applauds it for going beyond *Marbury* and its emphasis on private disputes to putting courts in a position where they “explicate and give force” to public values.³⁷⁸ On the other hand, Professor Jeremy Rabkin warns that “[t]hose who disagree with the political agenda of the lawyers will not be pleased to see them advance it through litigation. The lawyers can say they are performing a public service, but others will see their role as partisan.”³⁷⁹ The point is sharply illustrated by the fact that legal support for many reverse war on terror suits has come from vigorous opponents of the Bush administration and its policies.

Neither Margulies nor Zaring seems to view the label “political” as fatal. Margulies is clearly sympathetic to war on terror detainees and their lawyers. He seems mainly concerned with pointing out the risks of crossover advocacy, including unintended consequences,³⁸⁰ and with cautioning those who engage in it to look before they leap.³⁸¹ Zaring’s position is also ambiguous but tilting more to the negative side. He sees symbolic value in the suits and presents them as providing “a sort of democratic access” to government leaders.³⁸² He also sees the tiny window problem as an advantage of decentralized governance: “[I]t tracks issues into specific, small-scale, problem-solving institutions, like particular cases overseen by particular courts.”³⁸³ However, he questions the enforcement value of suits that are rarely won,³⁸⁴ and he also questions the value of “symbolism without . . . substance.”³⁸⁵ To the extent that lawsuits portend “an alternative form of administration,” Zaring is dubious about its success.³⁸⁶

376. *Id.* at 409.

377. See generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (discussing how the Supreme Court created a remedy gap by undercutting private individual empowerment by Congress to bring suit to vindicate public policy goals).

378. *Id.* at 201 (quoting Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984)).

379. Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 195 (1998).

380. See Margulies, *supra* note 74, at 413–21.

381. See *id.* at 422.

382. Zaring, *supra* note 71, at 317–18.

383. *Id.* at 366.

384. *Id.*

385. *Id.* at 358.

386. *Id.* at 339.

Although they do not view “political” as fatal, both analysts express grave concern about the political nature of the war on terror civil suits. Zaring asks the following question: “[A]lthough courts are not letting purely political claims proceed, the plaintiffs who sue are often quite political—and, as we have discussed, the criminal cases against high government officials have also been rather politicized themselves. Is such a political process worth it?”³⁸⁷

Margulies raises another concern:

Crossover advocates’ targeting of Yoo and other administration officials also threatens political polarization, of the kind that was routine during the era of the Independent Counsel statute. Prosecuting senior officials for war crimes might trigger prosecutions of political officials of the other party in a subsequent administration. The imperatives of partisan payback might squeeze out any hope of bipartisan problem-solving.³⁸⁸

For purposes of this Article, the emphasis on “political” raises two questions: Does the political nature of the suits threaten the legitimacy of courts that entertain them? And does the accompanying adversariness vitiate the courts’ abilities to serve as accountability mechanisms? As to the first, as noted above, many lawsuits can be characterized as political. The label does not somehow delegitimize them or the courts that hear them. Moreover, it is hard to distinguish suits that are political—or too political—from those that are not and that “should” be heard. One could even argue that the aptly named political question doctrine performs this function with some success. As I have contended elsewhere,³⁸⁹ the courts may have incorporated political questioning reasoning into the *Bivens* threshold inquiry. Perhaps the result is to help screen out political reverse war on terror suits. As for adversariness, it is endemic to the judicial process and to any recourse to it. Thus, the second question asked above simply begs the larger question of the extent to which the (inherently adversarial) judicial process (particularly the civil suit) should constitute an integral part of the broader search for accountability for the anti-terrorism policies of the Bush administration.

Institutional concerns do pose problems. However, by themselves, they may not be sufficiently severe to block a broad role for the judicial process in the form of the civil suit. There is no basic problem of legitimacy as long as one accepts the judicial function in constitutional adjudication and recognizes that our society has long looked to adjudication as a source for the development and exposition of public values in the course of resolving disputes. The arguments that the suits in question seem political or that

387. *Id.* at 358 (footnote omitted).

388. Margulies, *supra* note 74, at 416 (footnote omitted).

389. *See* Brown, *supra* note 16, at 889–92.

they run counter to a preference for equity over law in constitutional adjudication have weight, but do not seem dispositive. The experience of § 1983 suits against state and local governments—legal as well as equitable—is particularly relevant. However, we must again face the question as to whether § 1983 suits and *Bivens* actions are truly parallel. In particular, war on terror *Bivens* actions not only pit the federal courts against the political branches, but they also do so in the area of national security.

C. *The Obstacles to Civil Suits as an Example of National Security Deference*

It is, of course, a truism that suits challenging aspects of the war on terror inevitably run into the precept that the judiciary should show considerable deference to the political branches on issues of national security.³⁹⁰ “National security,” in this context, can have a broad meaning, although its genesis appears to be found in cases presenting military issues.³⁹¹ Thus, one could develop the thesis that reverse war on terror suits are hard to bring because they often encounter deference-based obstacles. These might include the following: the notions of national security concerns as special factors counseling hesitation in allowing *Bivens* claims, the use of the state secrets privilege to thwart or limit a suit, or a special claim of immunity in the war on terror context.

I want to suggest a different way of looking at the phenomenon. Consider the possibility that national security deference to the political branches, particularly the executive, is built into the constitutional system³⁹² and that a consistent refusal to allow war on terror civil suits to proceed past the threshold reflects that deference. Rather than simply a set of discrete, articulated doctrines that affect portions of the suits, there is a broader, unarticulated doctrine disfavoring them generally. National security deference reaches its zenith in the war on terror context.

The Supreme Court suggested as much in *Ashcroft v. Iqbal*.³⁹³ In rejecting the sufficiency of the plaintiff’s complaint, it noted that “the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”³⁹⁴ I find implicit in these remarks the notion that such decisions

390. *E.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 574–76 (2d Cir. 2009).

391. *See, e.g.*, *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988).

392. *See* Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1023 (2007) (describing the Supreme Court’s treatment of national defense issues as a “compromise approach of taking jurisdiction but showing healthy deference to the political branches”). Professor Robert Pushaw’s highly important contributions to the subject of deferential judicial review are discussed *infra* in the text accompanying notes 401–26.

393. 129 S. Ct. 1937 (2009).

394. *Id.* at 1952.

are not to be second-guessed in a tort suit. Especially given the extensive discussion of the national security context, the notion is explicit in the Second Circuit's statement in *Arar* that "[o]ur federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them."³⁹⁵

The question can be rephrased as asking whether national security deference is case-specific or whether it applies generally to reverse war on terror suits, viewed as a single phenomenon. A typical quote, from the Fourth Circuit decision in *El-Masri v. United States*,³⁹⁶ suggests a general approach in the context of a case involving the state secrets privilege:

The *Reynolds* Court balanced those concerns by leaving the judiciary firmly in control of deciding whether an executive assertion of the state secrets privilege is valid, but subject to a standard mandating restraint in the exercise of its authority. A court is obliged to honor the Executive's assertion of the privilege if it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." In assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the "utmost deference" to the responsibilities of the executive branch. Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information. In the related context of confidentiality classification decisions, we have observed that "[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information," and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." In the same vein, in those situations where the state secrets privilege has been invoked because disclosure risks impairing

395. *Arar*, 585 F.3d at 574.

396. 479 F.3d 296 (4th Cir. 2007).

our foreign relations, the President's assessment of the diplomatic situation is entitled to great weight.³⁹⁷

Lack of judicial competence, in particular, is a recurring theme, one which the Supreme Court accepted as recently as *Munaf v. Geren*,³⁹⁸ decided the same day as *Boumediene*.³⁹⁹ In response to a challenge to the executive's decision that the plaintiffs were not likely to be tortured if remitted to the Iraqi judicial system, the Supreme Court said that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."⁴⁰⁰

In developing the deference explanation, I have drawn heavily on the seminal treatment of deference in the writings of Professor Robert Pushaw.⁴⁰¹ Pushaw views the Supreme Court as having adopted "the compromise approach of taking jurisdiction but showing healthy deference to the political branches."⁴⁰² There is, of course, a wide range of views among academics as to the desirability of deference. Professor Geoffrey Stone argues that decision-makers are particularly prone to failure in times of crisis.⁴⁰³ They are liable to be too quick to exaggerate dangers and to sacrifice civil liberties.⁴⁰⁴ Professor Chesney cautions against undue judicial deference to the political branches at the expense of the courts' recognition of their own competence.⁴⁰⁵ For the purposes of this discussion, I will take Professor Pushaw's description as an accurate portrayal of current judicial practice. Certainly, the recent decision in *Holder v. Humanitarian Law Project*⁴⁰⁶ is a strong example of national security deference. I will also use "deference" in a general sense without attempting to distinguish between narrow issues of fact and broader issues of policy.⁴⁰⁷

There is an important difference, however, between what I view as the current situation—deference manifested by making a class of suits virtually

397. *Id.* at 304–05 (internal citations omitted).

398. 128 S. Ct. 2207 (2008).

399. *Boumediene v. Bush*, 553 U.S. 723 (2008).

400. *Munaf*, 128 S. Ct. at 2226.

401. See generally, e.g., Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165 (2002) [hereinafter Pushaw, *Judicial Review*]; Pushaw, *supra* note 392.

402. Pushaw, *supra* note 392, at 1023.

403. Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. REV. 1315, 1327–28 (2006).

404. *Id.* at 1328.

405. See Chesney, *supra* note 55, at 1409.

406. 130 S. Ct. 2705 (2010).

407. See Chesney, *supra* note 55, at 1398 (discussing decisions "that shade into policy judgments").

impossible to bring—and Pushaw’s favored solution. He views the Article III federal courts as having a necessary role to play when military and foreign affairs considerations can impact individual rights, as in the war on terror.⁴⁰⁸ Reviewing doctrine and case law from the founding to the present, Pushaw presents the following analysis: “[F]ederal judges have always entertained claims that military decisions have violated individual rights, albeit under very forgiving standards and with an awareness of political realities. I believe that such lenient judicial review is appropriate, and I would not endorse complete judicial abdication except in very rare and limited circumstances.”⁴⁰⁹ Deference is thus seen as close to, but less severe than, non-justiciability. In the reverse war on terror context, it basically leads to the latter. This can be seen in the working of individual doctrines such as *Bivens* and in the combined impact of the totality of doctrines discussed here on would-be plaintiffs.

If one accepts Pushaw’s analysis, the de facto abdication I have suggested here runs counter to established constitutional tradition. It also virtually eliminates the role of the civil suit as an accountability mechanism. The plaintiff files a complaint, often with fanfare, thus presenting some information, but a threshold dismissal eliminates the other stages. Pushaw’s approach at least gives us information, justification, and evaluation, even though the evaluation apparently always tilts strongly towards the government. “[M]ilitary or foreign affairs decisions that allegedly violate individual legal rights . . . are judicially reviewable, but under standards that resolve every doubt in favor of the validity of the government’s action.”⁴¹⁰ Merits decisions might accord more weight to defenses such as necessity and self-defense, thus providing a form of guidance. If the defendant wins, there is no sanction or compensation. One might view the present array of doctrines as a blunt instrument that deprives the civil suit of almost all its utility. Pushaw’s more nuanced approach has a twofold advantage: the judicial process is not eliminated as an accountability mechanism, and the potential shift in emphasis to the merits permits more stages of accountability to come into play. Of course, to reach this point, it would be necessary to rethink the doctrines that currently block reverse war on terror suits at the threshold. Such a development may be occurring with the state secrets privilege, for example, but for it to happen across the board would represent a significant doctrinal shift. A broader pro-plaintiff shift cannot be ruled out, for example, with respect to issues such as immunity and *Bivens*. However, the continuation of a high degree of deference leading to dismissal seems likely.

As noted, the desirability of deference is a matter as to which opinions differ sharply. Scholars have argued that normal standards of judicial review should apply to any examination by courts of actions of the political

408. See Pushaw, *supra* note 392, at 1079.

409. *Id.* at 1079 n.341.

410. Pushaw, *Judicial Review*, *supra* note 401, at 1199.

branches.⁴¹¹ There is force to the contention that judicial review is especially important in national security issues. The risk is great that the political branches will diminish the importance of civil liberties in times of a crisis such as the war on terror.⁴¹² It is at such moments that the independent Article III judiciary plays a particularly essential role as the only branch that can ensure a balance of constitutional values. Indeed, the textual foundations of national security deference are weaker than the functional ones. The fact that the Constitution grants the political branches a number of powers in this area⁴¹³ should not distinguish it from other areas where the Constitution grants powers. As for the judicial branch, all it has under the Constitution is the ability to hear cases and controversies that fit within the judicial power conferred by Article III.⁴¹⁴ The question is whether the *nature* of the national security powers assigned to the political branches calls for a different approach to judicial review of their exercise.

Still, the notion of national security deference is deeply ingrained in our constitutional tradition. Its institutional foundations make sense, as ably demonstrated by Professor Pushaw.⁴¹⁵ The question that arises is whether things have changed with the Court's decisions in a series of "enemy combatant" cases since the onset of the war on terror.⁴¹⁶ These cases have arisen in the context of petitions for habeas corpus. The Court, as Professor Pushaw puts it, "interpreted the habeas corpus statute generously,"⁴¹⁷ even to the point of distortion.⁴¹⁸ On the other hand, the substantive results represented a mixed bag of defects and victories for the President. "[T]hese three cases did not necessarily signal a major shift in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security."⁴¹⁹ Professor Pushaw wrote these words before *Boumediene v. Bush*,⁴²⁰ in which the Court took on both political branches. *Boumediene*, far more than its immediate predecessors, might be seen as the case that broke the back of national security

411. See Pushaw, *supra* note 392, at 1006 & nn.10–11, 1007, 1078 & n.339 (discussing criticism of deference). See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 118–19 (3d ed. 2009) (discussing judicial role in foreign policy).

412. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 545–46 (2004) (Souter, J., concurring) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.").

413. See, e.g., *Schneider v. Kissinger*, 412 F.3d 190, 194–96 (D.C. Cir. 2005) (emphasizing the number of different powers that the document grants to the executive and legislative branches).

414. U.S. CONST. art. III, § 2. With Congressional sanction, the courts also have a limited power to make certain appointments. U.S. CONST. art. II, § 2. This limited grant of power does not detract from the general statement in the text.

415. Pushaw, *supra* note 392, at 1078–83.

416. E.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

417. Pushaw, *supra* note 392, at 1054.

418. *Id.* at 1055.

419. *Id.* at 1056.

420. 553 U.S. 723 (2008).

deference.⁴²¹ The majority opinion emphasized the judiciary's *Marbury*-based role as the branch that says "what the law is,"⁴²² echoing its earlier statement in *Hamdi v. Rumsfeld*⁴²³ that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake."⁴²⁴

On the other hand, it is possible to see *Boumediene* as resting primarily on the key role of habeas corpus. The Court proclaimed the writ's "centrality," noting that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."⁴²⁵ I have raised elsewhere the argument that one should not extrapolate too far from the habeas cases, even if they are viewed as an assertion of the judicial role.⁴²⁶ Habeas raises the fundamental question of the lawfulness of executive detention and often presents the judiciary with familiar issues of the validity of procedures. Reverse war on terror suits would take the courts much further.

Certainly, the Court's two most recent war on terror decisions show a reluctance to go further and may even constitute a retrenchment. The importance of *Ashcroft v. Iqbal*⁴²⁷ has already been noted. *Holder v. Humanitarian Law Project*⁴²⁸ points in the same direction. *Holder* upheld a criminal statute that is a crucial component of the war on terror.⁴²⁹ It did so in the face of a vigorous First Amendment challenge, supported by three Justices.⁴³⁰ Both cases show deference toward the government and appreciation of the difficulties of waging the war on terror. *Iqbal* noted that "the Nation's top law enforcement officers [were acting] in the aftermath of a devastating terrorist attack"⁴³¹ *Holder*'s language is even stronger. The Court stated explicitly that deference was appropriate because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs."⁴³² Indeed, the opinion went further—endorsing the preventive approach to counterterrorism and recognizing the government's need to often act "based on informed judgment rather than concrete evidence."⁴³³ In perhaps the ultimate demonstration of the

421. See David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47, 47–48 (2008), available at http://www.cato.org/pubs/scr/2008/Boumediene_Cole.pdf (calling *Boumediene* a groundbreaking decision).

422. *Boumediene*, 553 U.S. at 765.

423. 542 U.S. 507 (2004).

424. *Id.* at 536.

425. *Boumediene*, 553 U.S. at 739.

426. Brown, *supra* note 16, at 899–900.

427. 129 S. Ct. 1937 (2009).

428. 130 S. Ct. 2705 (2010).

429. *Id.* at 2730–31.

430. *Id.* at 2731–43 (Breyer, J., dissenting).

431. *Iqbal*, 129 S. Ct. at 1952.

432. *Holder*, 130 S. Ct. at 2727 (majority opinion).

433. *Id.* at 2728.

importance of rhetoric, the Court's opinion closed with a citation of the Preamble to the Constitution and its recognition of the need to provide "for the common defence [sic]."⁴³⁴ *Iqbal* and *Holder* stand in stark contrast to the habeas decisions of a few years earlier.

V. CONCLUSION

The manner in which the Bush administration dealt with terrorism remains controversial; calls for an "accounting" continue. Yet, a "truth and reconciliation commission" along the lines proffered by Senator Leahy is not a realistic possibility, especially since many of the prior policies remain in place. At the moment, the most likely source of accountability is the judicial branch. Neither criminal prosecutions nor injunctive actions will play a significant role in this development. America's default accountability mechanism will be the civil tort suit, usually based on the *Bivens* constitutional tort doctrine, brought by self-proclaimed victims of the war on terror.

As this Article demonstrates, a host of judicial doctrines makes reverse war on terror suits hard to bring. Dismissal at or near the threshold is the likely result. The analysis posits two reasons, deeply rooted in the legal system, for this phenomenon: doubts about the tort suit as the means to effectively make policy through constitutional review and, more importantly, the role of national security deference in making it hard to bring suits that are, in effect, challenges to national security policies. This situation could change. Threshold doctrines such as the bar on *Bivens* suits that present "special factors counselling [sic] hesitation" could move in a pro-plaintiff direction. The result would be more suits, but deference might then come into play at the merits stage. This result, ironically perhaps, would be the unleashing of an accountability mechanism that provided a form of *justification* of what the Bush administration did. This may well be a desirable result, especially since so many of the former administration's policies have been continued by its successor. The most likely present and future judicial scenario is an array of suits, most of which are dismissed well before the merits.

Perhaps the judicial process is not the place to look for accountability. The emphasis on litigation seems to reflect the retributive motives that doomed the Leahy commission. Perhaps what is needed is a commission along the lines of the generalized, nonretributive model. It would look at past events more with a view to learning about them and from them than with a view toward making responsible parties pay. The accountability values of informing, justification, evaluation, and deterrence/compensation would be paramount. Compensation represents a separate issue and should be dealt with as such.⁴³⁵ Imposition of liability and sanctions on officials

434. *Id.* at 2731 (quoting U.S. CONST. pmb1.).

435. See Brown, *supra* note 16, at 909 (discussing proposals for a compensation system outside the judicial process).

would not be a priority.

I have presented the Leahy proposal and the current civil suits as polar ends of a possible spectrum. It could include existing institutions such as congressional committees and inspectors general and new ones such as a body along the lines of the 9/11 Commission.⁴³⁶ The key point is that where a polity stands on the accountability sought with respect to any particular official action will be the dominant factor influencing the choice of accountability mechanisms to examine that conduct. In the anti-terrorism context, let us identify the conduct as the Bush administration's war on terror, particularly in its early years. Do we start from a presumption of unlawfulness and immorality, and thus focus on blame and liability? Or do we state the central question as how best to fight terror, and focus on past actions not because they are viewed as "wrong" but because they are the raw material from which we must work in developing future policies? These two ways of framing the central question will determine the accountability approach and the mix of institutions to achieve it. The retributive commission proposed by Senator Leahy and the adversarial civil suits being attempted with decidedly mixed results do not represent the only approaches to accountability. If they both turn out to be failures, it may be time to seek a different approach.

436. The Commission's mandate included the following purposes:

(4) make a full and complete accounting of the circumstances surrounding the attacks, and the extent of the United States' preparedness for, and immediate response to, the attacks; and

(5) investigate and report to the President and Congress on its findings, conclusions, and recommendations for corrective measures that can be taken to prevent acts of terrorism.

Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 602(4)–(5), 116 Stat. 2383, 2408 (2002) (codified as amended at 6 U.S.C. § 101 note (2006)).

